No. 83-1498

Office - Supreme Court, U.S.
FILED
MAR 10 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BLACK CITIZENS FOR A FAIR MEDIA, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL R. OHLBAUM,
Counsel of Record
Suite 548
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3614

HENRY GELLER
Suite 900
1776 K Street, N.W.
Washington, D.C. 20006

WILHELMINA REUBEN COOKE
Citizens Communications Center
c/o Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Counsel for Petitioners

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Communications Commission can find that renewal of television and non-commercial radio licenses is in the public interest without individualized consideration of each applicant's programming performance, in reliance upon a presumption of operation in the public interest, supplemented by a random review of the actual performance of five percent of the licensees.

2. Whether the Commission in acting on applications for renewal of commercial radio licenses may rely for all licensees upon a presumption of operation in the public interest, with no sampling of any licensee's actual performance.

3. Whether the Commission has engaged in adequate, reasoned decision-making in its elimination of renewal procedures protective of the public interest.

PARTIES BELOW

The petitioners here, Black Citizens for a Fair Media, Chinese for Affirmative Action, the National Council of La Raza, the National Association for the Advancement of Colored People, and Henry Geller, were petitioners below. The respondents below and here are the Federal Communications Commission and the United States of America. Intervenors below in support of respondents were American Broadcasting Companies, Inc., CBS Inc., National Association of Broadcasters, National Radio Broadcasters Association, Argonaut Broadcasting Company, Bahia De San Francisco Television Company, Buford Television, Inc., Enterprise Publishing Company, Forward Communications Corporation, Futura Communications Corporation, GCC Communications of Hous-

ton, Inc., General Electric Broadcasting Company, Inc., Group One Broadcasting Company, Guaranty Broadcasting Corporation, Infinity Communications Corporation, KFAB Broadcasting Company, KRLA, Inc., KULA Broadcasting Company, Lake Broadcasting Company, Inc., Lake Huron Broadcasting Corporation, May Broadcasting Company, John H. Phipps Broadcasting Stations, Inc., Seven Hills Television Company, Spanish International Communications Corporation, Studio Broadcasting System, Division of Highwood Service, Inc., Summit Radio Corporation, Suncoast Stereo Corporation, WFDF Corporation, Wilson Communications, Inc., and WKRG-TV, Inc. Intervening below in support of petitioners was the Office of Communication of the United Church of Christ.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... (i)

TABLE OF AUTHORITIES ..... (iv)

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 21

APPENDIX 1a

Opinion of the United States Court of Appeals for the District of Columbia Circuit 1a

Orders of the Court of Appeals Denying Rehearing and Rehearing *En Banc* 60a, 61a

Judgment of the Court of Appeals 63a

Report and Order of the Federal Communications Commission 65a

Memorandum Opinion and Order of the Commission Denying Rehearing 161a

TABLE OF AUTHORITIES

Cases: **Page**

Action for Children's Television v. *FCC*,
564 F.2d 458 (D.C. Cir. 1977) 14

Alianza Federal de Mercedes v. *FCC*,
539 F.2d 732 (D.C. Cir. 1976) 16

Central Florida Enterprises v. *FCC*,
683 F.2d 503 (D.C. Cir. 1982) 19

Greater Boston Television Corp. v. *FCC*,
444 F.2d 841 (D.C. Cir. 1970) *cert. denied*,
403 U.S. 923 (1971) 20

Leflore Broadcasting Co. v. *FCC*,
636 F.2d 454 (D.C. Cir. 1980) 18

Motor Vehicle Manufacturers Assn. v. *State Farm Mutual Automobile Ins. Co.*,
___ U.S. ___, 103 S. Ct. 2856 (1983) 20

National Association of Regulatory Utility Commissioners v. *FCC*, 525 F.2d 630
(D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) 15

Office of Communication of United Church of Christ v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) 16

Office of Communication of United Church of Christ v. *FCC*,
425 F.2d 543 (D.C. Cir. 1969) 20

Office of Communication of United Church of Christ v. *FCC*,
707 F.2d 1413 (D.C. Cir. 1983) 6, 18, 20

Red Lion Broadcasting Co. v. *FCC*,
395 U.S. 367 (1969) 13, 21

Page

Statutes and Regulations:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.*:

Section 301 11
Section 307(a) 12
Section 307(b) 14
Section 307(c) 12, 13, 16
Section 308(a) 12
Section 308(b) 12, 15
Section 309(a) 12
Section 310(d) 12
Section 315(a) 14
Section 319(a) 12
Section 319(c) 12
Section 402(a) 4

Communications Amendments Act of 1982, Public Law 97-259, 96 Stat. 1087 13
Public Law 97-35, 95 Stat. 357 (1981) 13

28 U.S. Code § 2342 4

Federal Communications Commission Regulations:

47 CFR 0.281(a)(7) 14
47 CFR 0.281(a)(8)(ii)(A) 14
47 CFR 0.281(a)(10)(ii) 14
47 CFR 73.3526 8
47 CFR 73.3527 8

Federal Communications Commission Decisions, Reports, Etc.:

Children's Television Report and Policy Statement, 50 FCC 2d 1 (1974), *affirmed, Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977) 14

Deregulation of Radio, 84 FCC 2d 968 (1981), *rehearing denied*, 87 FCC 2d 797 (1981), *affirmed in part, Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir., 1983) 6, 18

Page

Further Notice of Proposed Rule Making, BC Docket No. 79-219, 48 Fed. Reg. 33,499 19

Leflore Broadcasting Co., Inc., 65 FCC 2d 556 (1977), *affirmed, Leflore Broadcasting Co., Inc.* v. *FCC*, 636 F.2d 454 (D.C. Cir. 1980) 18

Notice of Inquiry to Formulate Policies, 27 FCC 2d 580 (1971) 14

Notice in Docket No. 83-670, 48 Fed. Reg. 37,239 (1983) 14

Report and Order in the Matter of Children's Television Programming and Advertising Practices, FCC 83-609, Docket No. 19142, *released* Jan. 4, 1984 14

Revision of Form 303, 59 FCC 2d 750 (1976) 15

SJR Communications, Inc., 42 Pike & Fischer, Radio Reg. 2d 920 (1978) 18

FCC Report No. 17,882, BC Docket No. 79-219, March 2, 1984, Mimeo 2711 19

Miscellaneous:

S. Rep. No. 44, 82d Cong., 1st Sess. 7 (1951) 16

B.F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C.L. Rev. 1057 (1982) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

BLACK CITIZENS FOR A FAIR MEDIA, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-59a) is reported at 719 F.2d 407. The orders of the Court of Appeals denying rehearing and rehearing *en banc* (App. 60a, 61a) are unreported. The Report and Order of the Federal Communications Commission (App. 65a) is reported at 46 Fed. Reg. 26236 and 49 Pike & Fischer, Radio Reg. 2d 740. The Commission's Memorandum Opinion and Order denying rehearing (App. 161a) is reported at 87 FCC 2d 1127, 50 Pike & Fischer, Radio Reg. 2d 704.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1983 (App. 63a). Rehearing and rehearing *en*

banc were denied on December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2350(a).

STATUTE INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* are as follows:

Section 307(c):

> ***Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed five years in the case of television broadcasting licenses, for a term not to exceed seven years in the case of radio broadcasting station licenses . . . , if the Commission finds that public interest, convenience and necessity would be served thereby . . . . In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necesary to make its findings. . . .
>
> [47 U.S.C. § 307(c) (redesignated from § 307(d) by Public Law 97-259, approved Sept. 13, 1982, 96 Stat. 1087, 1093).]

Section 308:

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: . . .

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

[47 U.S.C. § 308(a), (b).]

Section 309(a):

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon

examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

[47 U.S.C. § 309(a).]

STATEMENT OF THE CASE

This petition seeks review of a judgment[1] affirming orders of the Federal Communications Commission (hereinafter the "Commission") which amended the license renewal application forms submitted every seven years by radio stations and every five years by television broadcast stations, to eliminate all questions providing information on the applicant's past record of program service to the public and its programming proposals for the next license term.

The proceeding was instituted by the Commission by Notice of Proposed Rule Making released July 11, 1980 (J. App. 47),[2] which postulated that since "most licensees meet or exceed" the Commission's programming guidelines, and very few renewal applications had been designated for hearing for failure to meet the guidelines, the then-current approach of obtaining program information

[1]The Court of Appeals had jurisdiction pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and 28 U.S.C. § 2342.

[2]References to "J. App." are to the Joint Appendix prepared below. A summary of the Notice is at 45 Fed. Reg. 47,444. References to "App." are to the Appendix hereto.

at renewal time[3] might be "a largely unnecessary paperwork and administrative burden on the licensee and the Commission." The Commission proposed that review of individual licensee performance was best eliminated in favor of primary reliance upon a "hard look" at a random sampling of full renewal applications together with complaints from the public, to bring sub-par licensee performance to the Commission's attention. (J. App. 48-49.)

Following the receipt of public comment upon the proposed changes, the Commission released a Report and Order on May 11, 1981 adopting essentially all of its proposals (App. 65a). While asserting that it was not making any "changes in our technical, programming, or other substantive requirements that licensees serve the public in-

---

[3]The Commission summed up its existing non-entertainment programming information requirements as follows (J. App. 55):

> "The Commission requires licensees to submit proposals for the amounts of informational programming proposed for the upcoming license term and a tabulation of the amounts presented during the composite week. Past promises are compared with the composite week performance to determine whether the licensee met its promises. Current promises are reviewed to determine whether the applicant proposes minimum amounts of news, public affairs and other nonsports programming. Commercial radio licensees submit this information in Questions 14, 15 and 16 of FCC Form 303-R. Television licensees submit the particulars concerning their presentation of this programming on FCC Form 303-A which is filed annually with the Commission. On their renewal applications, television licensees state whether these reports accurately reflect their programming during the current license periods, whether their programming substantially complied with what was promised on past renewal applications, and what they promise for the upcoming license terms."

The Commission noted that it also had processing guidelines for review of commercial practices (J. App. 56).

terest," the Commission made a "dramatic shift in our renewal procedures for broadcast licensees." (App. 65a.) The agency abandoned its long-standing practice of obtaining program service information from every licensee at renewal time in favor of a new postcard-size renewal application, to be used by all commercial and noncommercial licensees, except for "[a]t least five percent of all commercial TV and non-commercial licensees [who] will be selected at random to complete audit forms which are similar to the applications they currently file for renewal of license." (App. 66a.)[4]

The new so-called "simplified renewal application" form (App. 122a) inquires only as to the following matters:

> (1) the applicant's name, address and call letters;
>
> (2) whether required equal employment and ownership reports are on file with the Commission;

---

[4]In a separate "radio deregulation" proceeding decided February 24, 1981, all program percentage guidelines and commercial matter guidelines for radio licensees had been deleted in favor of "a generalized obligation for stations to offer programming responsive to issues facing their communities." (*See* App. 85a.) The requirement that radio licensees maintain program logs available to the public at the station was also deleted, although they were required at least annually to keep publicly available a listing of five to ten issues addressed with programming, along with examples of that programming. *Report and Order, Deregulation of Radio,* 84 FCC 2d 968 (1981), *affirmed* except as to the elimination of program logs, which the Commission was directed to reconsider. *Office of Communication of United Church of Christ v. FCC,* 707 F.2d 1413 (*see* particularly at 1426-35) (D.C. Cir. 1983). The deregulation order relieved radio licensees of the obligation to answer several questions on programming on the renewal form, and noted that the changes in Commission regulations there being made would be taken into account in any new form adopted in the postcard renewal proceeding. (84 FCC 2d at 1114.)

(3) whether the applicant is in compliance with the law respecting alien ownership interests;

(4) whether the applicant has been the subject of adverse findings by any court or administrative body concerning certain illegal conduct, *e.g.*, monopoly, fraud, or any felony; and

(5) whether the applicant has the required information in its public file maintained at the station.

A second feature of the new renewal process is to be a sampling of licensees for on-site inspections by Field Operations Bureau technical personnel to monitor compliance with technical requirements and insure that the licensees' public files contain the required information. (App. 66a.) It was further stated that the Commission's then Broadcast Bureau (now Mass Media Bureau) might conduct on-site inspections of licensees who submit "problem applications." (App. 66a.)[5]

The Commission explained that "the renewal process remains costly and time consuming for both licensees and the Commission. Broadcasters must reduce their records to the form demanded by the application. Once the application reaches the Commission, it must be checked in, routed to the various reviewing offices, reviewed and ultimately stored." (App. 69a-70a.) The Commission stated that "[u]nder the rules and policies adopted herein, the information necessary to conduct an in-depth review of a licensee's performance will be available at the station in the public inspection file. Interested citizens need only visit that file to avail themselves of the information necessary to support a complaint or petition to deny, should one be

[5]No such inspections have been made.

appropriate." (App. 81a.)[6] The Commission then stated that (App. 84a):

> In the absence of any indications to the contrary, the information supplied by the SRA [simplified renewal application] is thereby sufficient to make the statutory finding that grant of the subject renewal application would serve the public interest. However, the presumption of service in the public interest may be rebutted by SRA responses which indicate violations of statutory requirements, or Commission regulations. It would also be rebutted by substantial complaints or petitions to deny alleging violations of statute, the Commission's rules or policies. Moreover, in order to insure the continued viability of this presumption, we will institute random long form audits of television and noncommercial radio licensees. The audit procedure will provide independent assurance of the conclusions which support the presumption. (Footnotes omitted).[7]

---

[6]Under the new policies, commercial radio stations keep publicly available an annual issues/programs list (*see* note 4, *supra*). Commercial television stations keep composite week program logs, annual listings of community problems and needs and illustrative responsive programming, and current proposals for non-entertainment programming. (47 CFR § 73.3526.) Non-commercial station public file requirements are set forth in 47 CFR § 73.3527.

[7]The Commission stated that since it had eliminated its program percentage guidelines, commercial guidelines, etc., for radio licensees in the radio deregulation proceeding (see note 4, *supra*), a "long form audit" as to radio licensees "would serve no purpose." (App. 85a.)

The term "audit" is misleading as used by the Commission, since it means only the submission by a small percentage of licensees of substantial renewal information. Internal Revenue Service audits, in contrast, involve checking the accuracy of a sampling of full returns filed by all taxpayers.

A petition for reconsideration was denied (App. 161a). The Commission rejected requests that it obtain programming information at renewal time from all licensees, that it include a "yes-no" question on the television renewal form as to whether the applicant has met the standards in the Commission's processing guidelines, and that it require television licensees to tabulate the non-entertainment programming composite week data from their program logs and place this tabulation in the public file. (App. 162a-163a.) Tabulation of the log entries was found to be an unwarranted burden on licensees. (App. 163a.)[8]

The Court of Appeals, one judge dissenting, upheld the Commission, concluding that "the new license renewal system is adequate to permit the Commission to make the determination that a license renewal is in the public interest." (App. 19a.) The court noted that "[t]he Commission does not dispute that it is required affirmatively to find that a license renewal is in the public interest, and it agrees that '[a] broadcaster seeking renewal must run on his record, and the focus of that record is whether his programming has served the public interest.' Brief for FCC at 14; *see Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966)." (App. 8a.)

The majority was of the view, however, that since there was nothing in the Communications Act specifically mandating inclusion of programming-related questions in the renewal application, the Commission is "free under the Communications Act to alter the license renewal applica-

[8]A typical log for one day can run over 20 pages. The composite week for which logs are kept is composed of seven days of the different weeks chosen by the Commission. The task of tabulating this raw data for every station in the community is now the task of the interested citizen.

tion as it sees fit – provided that the Commission still has sufficient information to make the required 'public interest' determination." (App. 12a.) It concluded that the Commission did have "sufficient information," largely because the agency could properly rely upon "the input of the public" to raise programming questions as to licensee performance. The court also held that in view of the incentive given broadcasters to operate in the public interest by "the tools which the Commission uses to discover and punish violators,"[9] "the Commission has before it a presumption of service in the public interest." (App. 18a, 17a.) The court also held that the Commission had complied with reasoned decision-making requirements of the Communications Act and the Administrative Procedure Act.

A petition for rehearing, with a suggestion for rehearing *en banc*, was denied, three judges dissenting, on December 12, 1983 (App. 61a).

REASONS FOR GRANTING THE WRIT

This case presents a question of major importance in the administration of the broadcast licensing scheme of the Communications Act of 1934: whether the Federal Communications Commission can make the required finding that a broadcaster's license renewal is in the public interest without a review of the licensee's actual performance, substituting for such review a general presumption of adequate public service in the absence of public complaint, ac-

[9]The tools referred to are citizen complaints, the long-form "audit" used for five percent of television and non-commercial licensees, and on-site technical inspections by the Field Operations Bureau, in addition to available fines and license revocations.

companied, with respect to television and non-commercial radio, by a random 5 percent sampling of full renewal applications.

In "a dramatic shift" in its renewal procedures for broadcast licensees, the Commission has discarded a long history of requiring all broadcast licensees to furnish information concerning their performance at renewal time. From now on, the Commission will be acting on the vast majority of license renewals with no information from the licensee on such material elements of his performance as the time devoted to news and public affairs, programs of particular interest to children, local programming, and the time devoted to commercials. Only 5% of all commercial television licensees and non-commercial radio and television licensees will file so-called "long form audit" renewal applications similar to the renewal applications previously submitted by all broadcast licensees. All commercial radio stations, and 95% of the television licensees (commercial and non-commercial) and non-commercial radio licensees will be relieved of this requirement. This is indeed a dramatic shift and one which potentially affects the broadcast service received by every household in America. It is, furthermore, a shift in procedure which is at odds with the entire Congressional scheme for regulating the use of the radio spectrum for broadcast purposes.

Congress, if it had so chosen, might have created a broadcasting regulatory scheme relying upon random checks of compliance with substantive public interest standards and a presumption of service in the public interest in the absence of complaint from the public. Such a scheme would indeed have little use for substantial renewal applications to be submitted by every licensee. As the Communications Act of 1934 makes amply clear, however,

Congress took a quite different course. In order "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time," 47 U.S.C. § 301, Congress devised a scheme of individual broadcast licenses which may be granted, voluntarily modified, transferred, and renewed only upon a finding that the public interest would be served, a finding made in each case upon the basis of a formal written application. The application process is the cornerstone of the regulatory scheme.

Thus, a written application is required for: a construction permit, which precedes regular licensing (47 U.S.C. §§ 308(a), 309(a), 319(a)); a license to operate for a limited term, which is granted upon completion of construction in accord with the terms of the construction permit (47 U.S.C. §§ 307(a), 308(a), 309(a), 319(c)); a modification of license (47 U.S.C. §§ 308(a), 309(a)); an assignment of license (47 U.S.C. § 310(d)); and, most pertinent here, every renewal of license (47 U.S.C. §§ 307(c), 308(a), 309(a)).

The application for renewal of a broadcast license is required to set forth "such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; * * * the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require." 47 U.S.C. § 308(b). A renewal may be granted only "if the Commission finds that public interest, convenience, and necessity would be served thereby," 47 U.S.C. § 307(c). Section 309(a) provides:

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application."

The obvious purport of the statute, therefore, is that every broadcast licensee must demonstrate in the renewal application, with respect to major elements of its performance reasonably reportable in application form, that a grant of another license term is justified.

Furthermore, the governing public interest standard unquestionably focuses largely upon a licensee's service to its community. "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three years. 47 U.S.C. § 307(d).[10] The statute mandates the issuance of licenses if the 'public convenience, interest, or necessity will be served thereby.' 47 U.S.C. § 307(a). In applying this standard, the Commission for 40 years has been choosing licensees based in part on their program proposals." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 394 (1969).

---

[10]Congress in 1981 extended broadcast radio licenses to seven years and television licenses to five years. Public Law 97-35, 95 Stat. 357, 736. The applicable subsection, 307(d), was redesignated as 307(c) by the Communications Amendments Act of 1982, Public Law 97-259, 96 Stat. 1087, 1093.

The proposition that a licensee's program service is an essential component of the public interest is not at issue in this case. The Commission here stated that "[w]e have not adopted any changes in our technical, programming, or other substantive requirements that licensees serve the public interest. Only procedural requirements have been altered." (App. 67a.) And the Court of Appeals specifically noted the Commission's agreement that a "broadcaster seeking renewal must run on his record, and the focus of that record is whether his programming has served the public interest." (App. 8a.)

Thus, the Communications Act imposes upon broadcast licensees the duty to render a reasonable amount of local and informational programming.[11] The Commission has processing guidelines for commercial television stations (other than certain UHF stations),[12] and it requires licensees to direct some programs to the needs and interests of children. *Children's Television Report and Policy Statement,* 50 FCC 2d 1, 6, 8 (1974), *aff'd Action for Children's Television* v. *FCC,* 564 F.2d 458 (D.C. Cir. 1977); *Report and Order in the Matter of Children's Television Programming and Advertising Practices,* FCC 83-609, Docket No. 19142, released January 4, 1984.

---

[11] *See* Sections 307(b), 315(a), 47 U.S.C. §§ 307(b), 315(a); *Notice of Inquiry to Formulate Policies,* 27 FCC 2d 580, 581 (1971). *See also infra,* p. 18.

[12] These guidelines contain standards on commercial matter and percentages of time between 6 a.m. and midnight devoted to local programming (5%); informational (news plus public affairs) programming (5%); and total non-entertainment programming (10%), as well as on substantial variations between prior program representations and actual performance. *See* 47 CFR 0.281(a)(7); (a)(8)(ii)(A); (a)(10)(ii). The guidelines are now the subject of a notice of proposed rulemaking proposing their elimination or revision in light of the circuit court's partial affirmance of radio deregulation, *See Notice* in Docket No. 83-670, 48 Fed. Reg. 37,239 (Aug. 17, 1983).

The Commission's new "postcard renewal" scheme abandons the application renewal process mandated by Congress, and relies, for the great majority of television and non-commercial licensees, upon the public to present information which will show that a renewal is not in the public interest. Yet, data on a licensee's performance is conceded to be relevant, it is readily assembled by the licensee, whose own performance it reflects, and the Commission has previously given the assurance that it is the minimum necessary for the Commission to perform its unchanging duty. Thus, the Commission, in amending its broadcast renewal forms in 1976, stated (in comments applicable to both radio and television forms) that the revised forms were designed to better focus the Commission's attention "on those program categories which are particularly relevant to our public interest determination, *i.e.*, news, public affairs, all other programming exclusive of entertainment and sports, and commercial matter," and "to elicit only that information needed by the Commission to discharge its statutory responsibilities." *Revision of Form 303*, 59 FCC 2d 750, 769, 751 (1976). The burden put upon the licensee by Congress to submit information justifying renewal has now been converted by the Commission into a burden on the public to bring forth information supporting a denial of renewal.

There is nothing in the legislative history of the Communications Act, or in its interpretation by any court, to justify the Commission's "dramatic shift." Thus, *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976), which was strongly relied upon by the Court of Appeals to give the Commission practically unfettered discretion as to what information it will require from renewal applicants (App. 9a-11a), held no more than that 47 U.S.C. § 308 does not require Commission consideration

of the financial qualifications of Specialized Mobile Radio Systems[13] where financial fitness is properly found to be "irrelevant to its regulatory scheme." This decision has no application to concededly material and significant public interest considerations.

The lower court's reliance (App. 10a) upon the 1952 amendment to then Section 307(d) of the Act (now § 307(c)) to delete a provision which required that action on renewal applications "be limited to and governed by the same considerations and practice which affect the granting of original applications," is similarly misplaced. This change was designed to remove an unrealistic requirement, and nothing in the legislative history suggests that it was thought to authorize the Commission to refuse to inquire into each applicant's program performance at renewal time.[14]

"[I]t has been basic to the understanding of the renewal process by both Congress and the Commission that a licensee runs on his past record . . ." *Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732, 735 (D.C. Cir. 1976), and "in a renewal proceeding past performance is [the Com-

[13]SMRSs were a new category of private mobile operators providing service to third parties on a commercial basis in the land mobile radio services.

[14]To the contrary, the Senate committee report states that some matters, such as financial ability to construct a station or ability to operate it, might no longer be relevant at renewal time, but that "[i]t should be emphasized that while the recommended amendment does eliminate the necessity for the type of involved and searching examination which the Commission must make in granting an original license, it does not in any way impair the Commission's right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience and necessity." S. Rep. No. 44, 82d Cong., 1st Sess., p. 7 (1951).

mission's] best criterion." *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966). The Commission has now simply refused to obtain from the licensee the information on his past record necessary to make the required public interest finding,[15] in almost total reliance upon its own presumption that, in the absence of a complaint from a member of the public, a licensee has a broadcast record warranting renewal.

The real question in this case is whether the Commission is to be permitted through regulatory *hara kiri* to disable itself from administering the Congressionally mandated public interest standard of the Communications Act. We submit that the question is one of major significance, and that the decision below warrants review by this Court.

II.

Whatever might be said for the Commission's sampling process for television, in renewing commercial radio licenses the Commission is now acting on over 8000 renewals with no programming information from even a

[15]The Court of Appeals concluded (App. 13a) that the Commission would have enough information from several sources "to make the required determination that a licensee is in compliance with the substantive policies of the Commission – policies that are still concerned with programming and are not affected by the decision in question." The court's only suppport for this conclusion was a reference to the input of the public, "in many ways the most critical information. . . ." (App. 13a.) Then, in apparent recognition that public input on the renewals of thousands of broadcast stations cannot possibly insure the adequate presentation to the Commission of programming information the court declared (App. 14a) that "the new renewal system does not rely entirely on the public," without indicating at any point what other source there might be of programming information now eliminated from the renewal form.

sample of them, since no commercial radio licensees need file the so-called "audit" long form renewal application. While commercial radio has been "deregulated" (*see* note 4, *supra*), these radio licensees are still subject to the public interest requirement of providing non-entertainment programming responsive to community issues. *Deregulation of Radio,* 84 FCC 2d 968, 978-79 (1981), *aff'd in part Office of Communication of United Church of Christ* v. *FCC,* 707 F.2d 1413 (D.C. Cir. 1983), which established that the amount of essential public service programming, however defined, is relevant to the public interest judgment at renewal. (707 F.2d at 1433.) Therefore, even if the sampling technique adopted for television could be sustained as in compliance with the Communications Act, the absence of even a sampling process for commercial radio leaves the Commission's radio renewals devoid of any conceivable legitimizing rationale.

This point has added significance in that there is no assurance that the Commission will continue to sample 5 percent of television renewal applications, if its radio procedure is sustained. Rather, what is sanctioned today in radio can well become the standard tomorrow for television.[16]

III.

Finally, even if the statute could be construed to give the Commission the authority it claims, the Commission has failed to articulate a reasoned basis for thrusting upon the public the primary burden of presenting information on programming at renewal time. The Commission concededly must have "sufficient information" (App. 12a) before it

[16] *See,* note 12, *supra.*

to make the public interest judgment as to each renewal applicant, in order to ferret out those who render inadequate service.[17] But the only information the Commission has is that the public has not complained. There is simply no basis for the Commission to infer – to assume – that such lack of complaint means that the licensee is meeting its minimal public service obligations. As the dissent in the Court of Appeals stated (App. 56a-57a),

> Reliance on public participation to ensure that most violators of the programming obligation are caught is only valid if it can be shown that the public complains about most violators. The Commission has not even attempted to make such a showing. And it is unlikely that it could do so. The high cost of participation, in time and money, exerts a strong constraining pressure on the public.[18]

Moreover, the Commission not only initially eliminated all logs in radio, but upon remand,[19] has still decided to

[17] E.g., *Leflore Broadcasting Co., Inc.*, 65 FCC 2d 556, 567 (1977), *aff'd on other grounds, Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 462-63 (D.C. Cir. 1980) (non-entertainment programming not adequate); *SJR Communications, Inc.*, 42 Pike & Fischer, Radio Reg. 2d 920, 921 (1978) (non-entertainment programming not adequate).

[18] In the period between fiscal years 1969 and 1981, the Commission reported that there were 560 petitions to deny or substantial formal objections to renewal applications – less than 50 a year. Report of Broadcast Bureau prepared in connection with *Central Florida Enterprises v. FCC*, 683 F.2d 503 (D.C. Cir. 1982). In a recent study of the Commision's license renewal process it was found that in 1981 "[f]ew petitions to deny were being filed, and fewer still focused on programming grounds." B.F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record In Interpreting the Public Interest Standard*, 60 N.C.L. Rev. 1057, 1095 (1982) (interview with Deputy Chief of the Broadcast Bureau.)

[19] *See* note 4, *supra*. Despite its reliance on public participation, the majority below seems indifferent to the resolution of the logging issue (App. 17a).

not require the logging of all public service programming.[20] It is difficult to see how the agency can justify, and the court below approve, calling upon the public to monitor station performance while at the same time depriving the public of the practical means to do so. *See Office of Communication of United Church of Christ* v. *FCC, supra,* 707 F.2d at 1441-42, characterizing such action as "almost beyond belief."

And, it is plainly not reasonable to put upon the public the burden of tabulating weekly composites from raw television station logs, rather than leave this task to the licensee who seeks the privilege of using the public spectrum and who needs in any event to know how it has performed. All the Commission had to say about this was that the burden on licensees of compiling the data was "unwarranted." (App. 163a.)

This is not reasoned decision-making where existing public protections are being removed. *See Motor Vehicle Manufacturers Assn.* v. *State Farm Mutual Automobile Ins. Co.*, ____ U.S. ____, 103 S. Ct. 2856 (1983). Rather, the above actions constitute "danger signals" that the agency has ". . . not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). What is involved is a "curious neutrality-in-favor-of-the-licensee" in the critical renewal process. *Of-*

---

[20]Instead, the Commission only requires licensees to give five or more examples of public service programming on a quarterly instead of an annual basis. See FCC Report No. 17882, BC Docket 79-219, March 2, 1984, Mimeo 2711. Such a list is thus simply illustrative, and could amount to an hour or so of the year's programming, thus leaving the public and any comparative challenger adrift as to the amount of public service programming.

fice of Communication of United Church of Christ v. *FCC*, 425 F.2d 543, 547 (D.C. Cir. 1969).

CONCLUSION

The decision below is inconsistent with the Communications Act on a question involving the radio and television service received by the entire listening and viewing public of the United States. The Commission has forgotten that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). It is respectfully submitted that the petition for a writ of certiorari should be granted.

DANIEL R. OHLBAUM,
Counsel of Record
Suite 548
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3614

HENRY GELLER
Suite 900
1776 K Street, N.W.
Washington, D.C. 20006

WILHELMINA REUBEN COOKE
Citizens Communications Center
c/o Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Counsel for Petitioners

March, 1984

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1710

BLACK CITIZENS FOR A FAIR MEDIA, et al., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
NATIONAL RADIO BROADCASTERS ASSOCIATION,
OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
CBS, INC.,
ARGONAUT BROADCASTING COMPANY, et al., INTERVENORS

No. 81-2277

HENRY GELLER, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF BROADCASTERS, INTERVENOR

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petitions for Review of an Order of the
Federal Communications Commission

Argued May 24, 1982

Decided October 7, 1983

Jeffrey H. Olson, with whom *Karen Peltz Strauss* was on the brief, for petitioners in 81-1710.

Henry Geller and *Ira Barron* were on the brief, for petitioner in 81-2277.

Gregory M. Christopher, Counsel, Federal Communications Commission, with whom *Stephen A. Sharp*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, *Barry Grossman* and *Stephen F. Ross*, Attorneys, Department of Justice, were on the brief, for respondents. *Marion L. Jetton* and *Margaret G. Halpern*, Attorneys, Department of Justice, also entered appearances for respondent, USA.

Stephen A. Weiswasser, with whom *J. Roger Wollenberg* and *Susan Low Bloch* for CBS, Inc., and *James A. McKenna, Jr.*, *Carl R. Ramey* and *Douglas S. Land* for ABC, Inc., et al., and *Erwin G. Krasnow* and *Barry D. Umansky* for National Association of Broadcasters and *Thomas Schattenfield* for National Radio Broadcasters Association, were on the brief, for intervenors, CBS, Inc., et al., in 81-1710 and 81-2277.

Donna A. Demac was on the statement in lieu of brief for intervenor, Office of Communication of the United Church of Christ in 81-1710.

Robert H. Bohn, Jr., and *Honora Kaplan* were on the brief, for *amicus curiae*, Action for Children's Television urging remand in 81-1710.

Before: WRIGHT and BORK, *Circuit Judges*, and JAMESON,* *Senior District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* BORK.

Dissenting opinion filed by *Circuit Judge* WRIGHT.

BORK, *Circuit Judge*: Petitioners, Black Citizens for a Fair Media, *et al.*,[1] challenge the Federal Communications Commission's decision to adopt a simplified renewal application for radio and television broadcast licensees. This decision, made after a full rulemaking procedure, effectively eliminates from the license renewal application certain information which the Commission had previously required licensees to submit. Petitioners claim that this action is contrary to the substantive requirements of the Communications Act and that, in making the decision, the FCC failed to comply with the reasoned decision-making requirements of the Administrative Procedure Act and the Communications Act. We hold to the contrary and affirm the action of the Commission.

I.

This case is a companion to *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983), and *National Black Media Coalition* v. *FCC*, 706 F.2d 1224 (D.C. Cir. 1983). All three cases involve challenges to the effort of the Federal Communications Commission ("FCC" or "Commission") to reduce the regulatory burden on television and radio licensees.

In July 1980, the Commission filed a Notice of Proposed Rulemaking "to determine whether the public in-

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Petitioners also include Henry Geller, Chinese for Affirmative Action, National Council of La Raza, and the NAACP.

terest would be served by a revamping of [the] broadcast renewal application procedures." *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, FCC No. 80-327 (July 11, 1980), at 1. ("*Notice*").[2] This Notice, which resulted in the decision now being challenged, proposed a new procedure for renewing broadcast licenses. In the past, licensees were required to file extensive applications[3] containing, for example, such information as proposed non-entertainment and children's programming, the number of public service announcements which were broadcast, and the degree of compliance with FCC requirements for ascertainment of community needs and interests.

After reviewing the mechanics of this system, the FCC stated that its experience

> has shown that most licensees meet or exceed our operating guidelines . . . . [W]e have found that the best vehicle for bringing violations to our attention has been public participation in our processes through petitions to deny, informal objections, and complaints.

Notice at 2. The FCC concluded that the application might place an unnecessary administrative and paperwork burden on both licensees and the Commission.

The Notice therefore proposed a new application system that would consist of five different review components. First, all licensees applying for renewal would

---

[2] A summary of this Notice may be found at 45 Fed. Reg. 47,444 (1980).

[3] As the Commission noted, the commercial television application was 21 pages long, the non-commercial television application was 15 pages long, and the commercial radio form, while only two pages, was still a "substantial filing" by the time exhibits and attachments were added. *Notice* at 1.

submit a postcard-sized simplified renewal application containing answers to five questions.[4]

The second component is a long form audit—essentially the old renewal form—which would be sent to at least 5% of all television and non-commercial radio stations. (The FCC represents that, in fact, it has been selecting 10% of the eligible licensees for the long-form audit since the new procedures went into effect. Brief for FCC at 9 n.3.) Third, the FCC would continue to require licensees to make publicly available information as to how the licensees ascertained the problems and needs of their communities and the manner in which the licensee's programming addressed these problems and needs. Television stations would also have to include programming logs and programming "promises" in their public files.[5] The FCC stated its belief that this public file would make sufficient information available to permit the public to test any concerns regarding a licensee's fulfillment of the public service requirement[6]—an important consideration given the Commission's reliance on public participation to bring violations to the Commission's attention.

---

[4] These questions include (1) the licensee's name and location, (2) whether the licensee has filed annual employment reports, (3) whether the license is in compliance with section 310 of the Communications Act which deals with alien control or ownership of broadcast stations, (4) whether a court or tribunal has entered an adverse finding as to particular conduct bearing on a licensee's character, and (5) whether a licensee has placed all required documents in its public file. *Notice*, Appendix A.

[5] Radio stations would not have to include such information under the FCC's radio deregulations. *See* Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

[6] Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, 49 Rad. Reg. 2d (P & F) 740, 747 (1981).

Fourth, the FCC's Field Operations Bureau would conduct random audits of licensees to inspect technical operations and to insure that all required information was being made available to the public. Fifth, the Broadcast Bureau would conduct on-site inspections into charges of licensee misconduct. The Bureau would also have the power to conduct audits of licensees who submit problem applications. Other licensees might be audited on a random basis.

On May 11, 1981, after receiving numerous comments from various broadcast groups and "public interest" media groups, the FCC issued its report and order substantially adopting the proposals as put forward in the *Notice*. *Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 49 Rad. Reg. 2d (P & F) 740 (1981) (*"Decision"*). In promulgating the new system, the FCC stressed that the rulemaking "proceeding was never intended to change our current substantive requirements for the broadcast industry, and it does not alter the substance of licensee obligations to serve the public interest." *Id.* at 748. Reconsideration of this decision was then sought by petitioner Henry Geller, but was denied. *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 87 F.C.C.2d 1127 (1981) (*"Reconsideration Decision"*). Petitioners now appeal to this court.

II.

Petitioners challenge the FCC's adoption of the new license renewal system on two grounds. First, they contend that the FCC's action violates the mandate of the Communications Act which requires the Commission to find that "the public interest, convenience, and necessity would be served" by a renewal of a broadcast license. 47 U.S.C. § 307(d) (1976), as amended by the Communications Amendments Act of 1982, Pub. L. No. 97-259,

§ 112, 96 Stat. 1087, 1093 (to be codified at 47 U.S.C. § 307(c)). Petitioners say the FCC is unable to make that affirmative determination without the inclusion of program-related questions in the renewal form. Second, petitioners argue that even if the FCC has the discretion to alter the renewal procedures in the proposed manner, the Commission failed to comply with the reasoned decision-making requirements of the Communications Act and Administrative Procedure Act. We address these points in order.

A.

In determining the mandate of the Communications Act, 47 U.S.C. § 151 *et seq.* (1976 & Supp. V 1981), this court must focus on the language of the Act itself, with due deference to the Commission's interpretation of its own organic law. Subject to the review we discuss below, the FCC is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest, though it must give a sufficient explanation of that change. *See Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37, 49 (D.C. Cir. 1978). The language of the Act imposes few specific requirements and the FCC is generally given broad discretion. The public-interest standard is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). For that reason, petitioners' reliance on past FCC statements of its mandate is misplaced.

The key section which petitioners invoke in support of their argument is section 307(c)[7] which provides in part:

> Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed five

[7] Former subsection (d) of section 307 was redesignated subsection (c) and amended by the Communications Amendments Act of 1982, Pub. L. No. 97-259, § 112, 96 Stat. 1087, 1093.

> years in the case of television broadcasting licenses, for a term of not to exceed seven years in the case of radio broadcasting station licenses, and for a term of not to exceed ten years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby.

47 U.S.C. 307(d) (1976), as amended by the Communications Amendments Act of 1982, Pub. L. No. 97-259, § 112, 96 Stat. 1087, 1093 (to be codified at 47 U.S.C. § 307(c)). Petitioners also refer to section 309(a) which requires the Commission to determine for each application filed with it whether the public interest, convenience and necessity will be served by the granting of such application. 47 U.S.C. § 309(a) (1976).

Petitioners then argue that, although the "public interest, convenience and necessity" is not defined in the statute, the term "public interest"

> has historically been defined in terms of nonentertainment programming . . . . [A] licensee's past nonentertainment programming performance is the essential criterion upon which the affirmative public interest determination must be made at renewal time.

Brief for Petitioners Black Citizens for a Fair Media, *et al.* ("BCFM") at 22-23. In sum, petitioners' position is that the simplified renewal application violates the FCC's statutory mandate because it eliminates all questions concerning nonentertainment programming.[8]

The Commission does not dispute that it is required affirmatively to find that a license renewal is in the public interest, and it agrees that "[a] broadcaster seeking renewal must run on his record, and the focus of that record is whether his programming has served the public interest." Brief for FCC at 14; *see Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966) (*United Church I*). All that

---

[8] Petitioners also complain about the elimination of questions relating to certain entertainment programming such as children's programming.

is in dispute is whether the FCC is required to include programming-related questions in its renewal application.

An examination of the statute and case law clearly shows that such questions are not statutorily required and that the FCC has the discretion to determine whether to include them. First, it is obvious from reading the relevant statutory sections—sections 307(c), 308(b), and 309(a) of Title 47—that Congress did not prescribe specific inquiry into programming. Indeed section 308(b) explicitly addresses the issue of applications and lists certain subjects about which the Commission may inquire.[9] While the enumerated factors are not exclusive, it is significant that programming questions are not included. Moreover, since one would expect some degree of symmetry between the Commission's discretion on applications and that on renewals, it is significant that this circuit has held in regard to application form questions that

---

[9] Section 308(b) provides:

> All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

47 U.S.C. § 308(b) (1976).

> [Section 308(b)] leaves it within the discretion of the Commission to decide which facts relating to such factors it wishes to have set forth in applications.

National Association of Regulatory Utility Commissioners v. *FCC*, 525 F.2d 630, 645 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). Petitioners contend, in effect, that an empowering statute that explicitly grants the Commission broad authority must be read implicitly to impose a highly specific duty. Without more, this is a dubious proposition.

A review of the legislative history of the Communications Act and past actions of the FCC reinforces our reading of the statutory text. Prior to 1952, the Communications Act limited the FCC's discretion to grant renewal by requiring the FCC to employ the same practices and considerations it would employ if it were granting an initial license. In 1952, however, Congress eliminated this requirement and inserted the more general "public interest, convenience, and necessity" standard. Communications Act Amendments, 1952, ch. 879, § 6(a), 66 Stat. 711, 714-715. The House Report clearly shows that Congress wanted to reduce the regulatory burden on licensees and grant the FCC discretion to tailor the renewal form as it saw fit. *See* H.R. Rep. No. 1750, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 2234.[10]

In the past, the Commission has frequently added and subtracted questions as it deemed appropriate. For example, it was not until the 1960's and 1970's that questions concerning ascertainment of community needs and

---

[10] The Report notes:

> Considerable dissatisfaction was expressed . . . with the burdensome requirements which applicants for renewal sometimes have been compelled to meet in the way of furnishing detailed information.

H.R. Rep. No. 1750, *supra*, at 8, *reprinted in* 1952 U.S. Code Cong. & Ad. News at 2242.

children's programming were added to the form.[11] Certainly, if the FCC can add specific questions, it can delete them when circumstances warrant.

Moreover, the Commission frequently decides to monitor and enforce certain aspects of a licensee's performance—*e.g.*, compliance with the fairness doctrine—on an ad hoc basis rather than at the time for license renewal. *See National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095, 1115-16 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (Communications Act does not require FCC to review fairness doctrine compliance at renewal time; decision to review on ad hoc basis is reasonable exercise of discretion). Thus, the legislative history of the Communications Act and past FCC actions make clear that the FCC is in no way required to retain certain questions, whether program-related or not, in the renewal application.[12]

Finally, case law strongly supports the broad exercise of FCC discretion both to define the public interest and to determine what procedures best assure protection of that interest. As the Supreme Court has pointed out:

> Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked . . . were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest.

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. at 138.

---

[11] *See* Commission En Banc Programming Inquiry, 44 F.C.C. 2303, 2316 (1960); Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 43 F.C.C.2d 1, 57 (1978).

[12] The statute does require the inclusion of certain technical information such as the nature of licensee ownership, although it does not prescribe specific questions. 47 U.S.C. § 308(b) (1976).

Moreover, the Supreme Court recently found that this discretion is particularly broad in the area of programming. In *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981), the Court upheld a decision by the FCC not to review entertainment format changes in the context of a license renewal application, noting that "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *Id.* at 596. *See also National Tour Brokers Association* v. *ICC*, 671 F.2d 528, 531-32 (D.C. Cir. 1982) (upholding revised ICC licensing procedure involving "public interest" determination; prior ICC interpretation of statute does not forever bind agency).[18] There can be little question that the FCC is free under the Communications Act to alter the license renewal application as it sees fit—provided that the Commission still has sufficient information to make the required "public interest" determination.

This latter issue is the crux of petitioners' complaint. Petitioners contend that even if the FCC has discretion to alter the application, the changes that the Commission has adopted so completely eliminate important information as to make meaningful enforcement of the public interest standard impossible. Although the FCC has deleted from the application many questions which previously supplied substantial information, we believe that it was not arbitrary or capricious for the Commission to conclude, in the exercise of its discretion, that it still has sufficient information to make the "public interest" determination.

---

[18] *National Tour Brokers* is in many ways analogous to this case. In the former, the National Tour Brokers Association challenged the ICC's simplification of its licensing procedures for passenger tour brokers. The court upheld the agency's action noting that the statute did not mandate the previous licensing system and that "[i]n the absence of a definition of 'public interest' by Congress that would require individual case-by-case determinations, the ICC was within its authority to utilize a general finding that the public interest is served by the licensing of 'fit' applicants as brokers." 671 F.2d at 531.

The Commission does not propose to rely solely on the postcard application to make the "public interest" finding. The postcard renewal form is one of several sources of information (direct and indirect) on the basis of which the Commission will make its renewal decision. This information, taken together, does permit the FCC to make the required determination that a licensee is in compliance with the substantive policies of the Commission—policies that are still concerned with programming and are not affected by the decision in question.[14]

A brief review of the renewal system illustrates this point. First, the Commission has the renewal form itself which provides (1) information concerning a licensee's equal opportunity program, (2) a description of a licensee's other media interests, (3) a certification of compliance with the alien ownership requirements of the act, (4) disclosures about a licensee's character, and (5) a certification that the licensee has placed all required documents in its public file.

Second, the FCC will have the input of the public. This is in many ways the most critical information, as the Commission has "found that the best vehicle for bringing violations to [its] attention has been public participation in [its] processes through petitions to deny, informal objections, and complaints." *Notice* at 2. Under the new renewal system public input provides information in two ways. As the *Notice* pointed out, the public brings violations to the attention of the FCC. Thus, public silence supports an inference that a licensee has been complying with FCC policies.[15] Such an inference is of course not in

---

[14] Petitioners concede that the great majority of broadcasters "are responsible and will follow the policies, with or without these supplementary procedures." Brief for Petitioner Henry Geller at 11. Thus, the question is whether the renewal system will ferret out the few broadcasters who do not comply with the substantive policies.

[15] From all indications, the public has not been reticent about registering complaints. During the 12-month period

any way conclusive; but it is a factor which the FCC may weigh in making a "public interest" determination.

Petitioners contend that this reliance on the public constitutes an impermissible shift of the FCC's statutory duty onto the public. This argument, however, overstates the FCC's reliance on public participation. Contrary to assertions by petitioners, the new renewal system does not rely entirely on the public. Rather, information provided by the public is but one factor, albeit an important factor, in the overall renewal scheme. Moreover, the degree of reliance is not unreasonable because, as the Commission notes, the public is quite aware of licensees' programming. Brief for FCC at 22. Such reliance on the public is especially warranted in an era of limited resources when the FCC must allocate its budget over a wide range of regulated activities. *Cf. United Church I*, 359 F.2d at 1004-05 (recognizing importance of public participation in renewal process, given limited staff and resources). The public's responsibility in the prior system was also substantial. Indeed, it was the FCC's recognition of the importance of the public's role that led, in part, to the promulgation of the new system.

Finally, petitioners argue that, even if the FCC's reliance on the public is permissible, the Commission has made it impossible for the public to play an active role in the renewal procedure. In this regard, petitioners point to FCC actions which petitioners claim have severely limited the information licensees must provide to the public.[16] In order to determine the validity of this claim,

---

through October 1981, approximately 3000 programming-related complaints were sent to the FCC, not including organized write-in campaigns. Brief for FCC at 22 n.25.

[16] It should be noted that the *Decision* is premised, in part, on the Commission's belief that sufficient information is available in the public file.

we examine separately the public file requirements of television and radio licensees.[17]

Television licensees must place a substantial amount of information in their public file. For example, a licensee must include documentation concerning ascertainment of community problems as well as an annual list of no more than ten significant problems or needs of the community served, along with examples of programs which meet these problems or needs. 47 C.F.R. § 73.3526(a)(9) (1982). In addition, television licensees must maintain program logs for the composite week and keep on file current "promises" concerning presentation of nonentertainment programming; if a licensee changes its general plans for such programming, it must then file an update noting the changes and the new programming promises.[18] *Id.* § 73.3526(a)(8). Finally, television licensees must also maintain raw program logs (a written record of everything a licensee broadcasts), *id.* § 73.3526(a)(10), and make these logs available for public inspection in accordance with certain procedures, 47 C.F.R. § 73.1850 (1982).[19] This information is sufficient to permit the pub-

---

[17] Licensees must certify on the renewal application that all required information has been placed in the public file. If a licensee so stated but in fact failed to provide such information, it would commit a serious violation and would be subject to FCC sanctions.

[18] *Reconsideration Decision* at 1129. The Commission has defined a "substantial deviation," the occurrence of which requires an update, as a 15% decrease in any one of the three nonentertainment categories or as a 20% decrease overall. *Id.* at 1129 n.5.

[19] Petitioners contend that raw logs are unhelpful because they contain such a large number of data that a long, painstaking analysis is required if the logs are to provide information as to a licensee's performance. The petitioners would prefer composite week logs which tabulate into programming categories a licensee's programming. Thus, petitioners specifically complain about the FCC's elimination of Form 303-A,

lic to review a station's programming performance.[20]

In contrast, radio licensees need file only an annual issues/programs list[21] and an explanation of the methodology used to compile the list.[22] Petitioners argue that

---

a yearly tabulation of composite week logs in which percentage figures for news, public affairs, and "others" (exclusive of entertainment and sports) are listed.

The FCC eliminated Form 303-A because in its view the burden on the licensee of completing the form was unwarranted. *Reconsideration Decision* at 1128. However, the citation accompanying this statement refers to a paragraph of the *Decision* which discusses the burden on the *Commission*. *Decision* at 754-55. Either of these burden reductions is an advantage the Commission is entitled to weigh in its decision; under the new system, the Commission need not review the logs and the licensee is not required to prepare them (although it may do so). The assessment of this benefit and the importance of tabulated logs we leave to the Commission. There is clearly no explicit statutory requirement that either the Commission or the licensee tabulate these data. Indeed, the Commission did not require the submission of Form 303-A until 1973. Renewal of Broadcast Licenses, 43 F.C.C.2d 1, 70 (1973).

[20] Petitioner BCFM also complains that the FCC's decision to eliminate required bi-monthly public service announcements which inform the public of the licensee's obligation to operate in the public interest and of the various ways for the public to express its views about the licensee's performance. (The FCC retained the requirement that licensees make such announcements during the six months prior to the renewal date.)

The complaint is unfounded because the Commission made a specific finding that the announcement did not generate public participation. Petitioners offer nothing other than their own opinion to contradict this finding. Accordingly, we uphold the Commission's action.

[21] This list consists of issues which the licensee has determined are important to the community and programs broadcast in response to those issues.

[22] While this list is placed in the public files, it is not submitted to the FCC. This does not detract from the list's

this list is too insubstantial to permit meaningful review by the public of a station's programming and urge the inclusion of program logs. In a companion case dealing with the FCC's general deregulation of radio, we remanded the Commission's decision to do away with the logging requirement. *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (*United Church III*). On remand, the Commission will decide what logging requirement, if any, is appropriate in the deregulated environment. Given the Commission's wide latitude in the practical implementation of Congress' will, we do not find that the renewal procedure mechanism adds any new factors to the calculus already required by *United Church III*. The new renewal procedure will function acceptably given whatever logging requirement the Commission (subject to judicial review) eventually adopts in response to our remand. Accordingly, we neither invalidate the new renewal system on this basis nor provide any additional condition that any logging requirement must meet.

Finally, the Commission has before it a presumption of service in the public interest. *Decision* at 748. Petitioners attack this presumption as being contrary to section 309(c) of the Communications Act and such cases as *United Church I*, 359 F.2d at 1008, and *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543, 545 (D.C. Cir. 1969) (*United Church II*), which hold that a licensee must affirmatively demonstrate that renewal will serve the public interest. This attack is misplaced. Neither the statute nor the legislative history precludes the Commission from inferring service in the public interest by existing licensees, given that the inference is rebuttable and the regulatory environment

---

importance, however, because the list provides information to the public, and it is the public's reaction—either complaints or silence—which in turn provides information to the Commission.

provides strong incentives for operation in the public interest.[28]

Those incentives are generated largely by the tools which the Commission uses to discover and punish violators. Investigation of citizen complaints is one important tool. In addition, the long form audit and on-site inspections by the Field Operations Bureau and Broadcast Bureau are designed not only to provide the Commission with concrete information on the specific licensees audited but also to deter licensees from non-compliance with the substantive requirements. The Commission can also prevent potential violations by punishing those discovered with fines and license revocations. The severity of such sanctions, *see, e.g., WADECO, Inc.* v. *FCC*, 628 F.2d 122 (D.C. Cir. 1980), and the willingness of the FCC to impose them make more reliable a presumption that a licensee will adhere to the substantive requirements of the Commission and the Act.

Petitioners respond to this contention by arguing that only a small percentage of licensees are subject to the random audit and spot checks and that consequently the deterrent effect of such devices is minimal. All licensees will be affected by the knowledge some unknown number will be examined and, if appropriate, visited with severe sanctions. Moreover, the determination concerning degrees of deterrence is precisely the type of judgment which is best left to the Commission. Nor is the fact that the FCC may not be able to identify all noncomplying licensees a reason to overturn the decision. No regulatory scheme which depends in part on the good faith of the licensee will be utterly fool-proof; the previous system certainly was not. Both approaches ultimately rely on presumptions and on the good faith of the licensees.

---

[28] The inference is also supported by the Commission's traditional limited reliance on licensee good faith.

The simplified renewal application also offers concrete benefits in the form of reduced paperwork and expense. While these factors are not, of course, grounds for ignoring a statutory mandate, they are an advantage the Commission is entitled to weigh in making its decision. The Federal Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501-3520 (Supp. V 1981)), was enacted "to minimize the federal paperwork burden," 44 U.S.C. § 3501(1) (Supp. V 1981). This is to be accomplished by eliminating regulatory burdens "which are found to be unnecessary and thus wasteful . . . ." S. Rep. No. 930, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6241, 6243. Congress specifically applied this policy to the FCC's domain when it extended the broadcast license term to five years for television stations and seven years for radio. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241, 95 Stat. 357, 736.[24] Thus, the reduction in regulatory burden which the FCC has effected is not just a result of FCC impulse, but rather stems directly from the Paperwork Reduction Act and congressional policy with respect to the FCC. There can be little doubt that this mandate provides further support for the FCC's decision.

We conclude that the new license renewal system is adequate to permit the Commission to make the determination that a license renewal is in the public interest.

---

[24] The Conference Report noted:

> [T]he extension of terms for broadcast licensees would help to reduce costs to broadcasting and the Commission costs, while at the same time allowing the Commission to do a better job reviewing broadcasters' performance.

H.R. Rep. No. 208, 97th Cong., 1st Sess. 895 (Conference Report), *reprinted in* 1981 U.S. Code Cong. & Ad. News 1010, 1257.

B.

Petitioners' second major argument is that even if the FCC has the statutory discretion to adopt the simplified renewal application, the Commission has nevertheless failed to comply with reasoned decision-making requirements of the Communications Act and the Administrative Procedure Act. The Commission's decision, however, readily survives the "searching and careful" review to which we subject it. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

Here, our review must include an additional special factor: the FCC's adoption of the simplified renewal application represents a significant change in policy. The court must, therefore, be satisfied that the agency was aware that it was changing its views and has articulated permissible reasons for the change. *See Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).[28]

This is not a case where an agency altered course without acknowledging or recognizing the change. The first paragraph of the Notice states that the proceeding was being initiated to determine whether the FCC should "revamp" its renewal procedures. *Notice* at 1.

---

[28] In emphasizing that we pay special attention to changes in agency policy, we have sometimes referred to our scrutiny as being "heightened." *E.g.*, NAACP v. FCC, 682 F.2d 993, 998 (D.C. Cir. 1982). Of course, this scrutiny consists in ensuring that "the agency was aware it was changing its views and has articulated permissible reasons for the change, and also that the new position is consistent with the law." *Id.* We take pains to ensure that an agency knows what it is doing in enacting a new rule and closely scrutinize any agency action to assess both the reasons articulated and the action's conformity with law. In other words, the nature of our scrutiny is the same whether the action is wholly new or a revision of an older rule; a change is another factor to scrutinize, not a warrant for employing a different standard of review. Our scrutiny is heightened in that it includes this additional factor.

Nor is this a case where the agency has failed to provide a reasoned explanation for its change in policy. Here the Commission clearly set out its rationale; namely, that the same degree of compliance could be achieved with the simplified renewal application. While this finding is not in itself rigorously deduced, it is well established that greater deference is given administrative bodies when their decisions are based upon "judgmental or predictive" conclusions. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978). *Accord FCC* v. *WNCN Listeners Guild*, 450 U.S. at 595-96. The FCC also clearly stated that adoption of the simplified renewal application would in turn "free up scarce resources for use in other areas." *Decision* at 747. This finding was factually supported in the record by, for example, estimates of the funds that would be saved by adoption of the new form. *E.g.*, *Decision* at 754.

Petitioners specifically attack two aspects of the *Decision*. Petitioners assert that the basis of the FCC's decision was the conclusion that past experience indicated most licensees comply with the substantive regulations.[26] They then contend that this conclusion does not warrant altering the procedures and, if anything, supports retaining the old system.[27] This argument, however, dis-

---

[26] In support of this assertion, petitioners point to the following language:

> We observe that over the years most licensees have met or exceeded our operating guidelines and a renewal process which has consumed substantial Commission resources has resulted in few applications designated for hearing for failure to comply with our rules and policies.

Decision at 743. This statement was not the basis of the FCC's decision; rather, it was merely an observation that the previous guidelines were to some degree excessive. The more important basis of the decision was that the new system would work equally well.

[27] Petitioners state:

> The abandonment of efficacious procedures, on the ground, that they were efficacious, hardly constitutes reasoned

torts the Commission's position. The Commission discarded the old system for the new not because the old system worked, but rather because it believed the new system would work just as well:

> We believe that we can discharge our obligations by adopting a simplified renewal application (SRA)....

Decision at 741. In overlooking the Commission's conclusion that the new method could achieve equivalent compliance, petitioners reveal the true nature of their complaint; they believe the old system works better and wish to substitute their judgment for that of the Commission. When seen in that light, petitioners' argument must fail.[28]

As we have noted, and as petitioners concede, the Communications Act gives the FCC "substantial discretion to reconsider and review the appropriateness of [its] regulations including the continued need for particular information in connection with renewal applications." *Decision* at 747; *see National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d at 645. Moreover, the FCC has worked with renewal applications for many years and has developed considerable expertise and experience.[29] *See West Michigan Telecasters, Inc.* v. *FCC*,

---

> decision-making. If anything, the Commission's rationale merely confirms the continued need for the traditional renewal procedures . . . .

Brief for Petitioners BCFM at 40.

[28] Petitioners also assert that reasoned decision-making requires a comparative assessment of the two renewal schemes and implies that the FCC should have conducted a study of some kind. This argument is without merit. The FCC's expertise permits it to make the decision without resorting to an independent study. *See NAACP* v. *FCC*, 682 F.2d at 1001 (rejecting argument that FCC should have conducted independent study prior to changing its Top-Fifty Policy).

[29] In *National Tour Brokers*, 671 F.2d at 533, the court found that the ICC's decision to simplify licensing procedures

396 F.2d 688, 691 (D.C. Cir. 1968) (court "defer[s] to the expertise and experience of the Commission within its field of specialty and would reverse only where the Commission's position is arbitrary, capricious or unreasonable").

Petitioners also argue that the FCC cannot dispense with the old system on the basis of a desire to relieve itself and/or licensees from regulatory burdens. Again, however, this argument is premised on petitioners' belief that the new system will not serve the public interest. The FCC has reasonbly rejected that premise and we must reject the conclusion. The Commission may consider regulatory burden in choosing between two procedures, each of which serves the public interest. The FCC is, moreover, statutorily authorized to reduce the regulatory burden on licensees and we find this to be additional support for the Commission's action.

Accordingly, the orders here under review are

Affirmed.

---

was not unreasoned because the "decision was based on the Commission's long experience administering the existing license rules and its consequential dissatisfaction with those procedures." Similarly, in this case, the FCC's experience, which is fully documented in the record, provides a reasoned and rational basis for the decision.

WRIGHT, *Circuit Judge, dissenting*: The Federal Communications Commission (the Commission) has in recent years undertaken a substantial deregulation of broadcasting in this country. In two companions to this case, *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), and *Nat'l Black Media Coalition v. FCC*, 706 F.2d 1224 (D.C. Cir. 1983), this court approved, with some reservations, the bulk of the Commission's dergulatory effort. In the present case petitioners, Black Citizens for a Fair Media *et al.*, have brought a challenge to the Commission's recent deregulatory endeavors in the area of broadcast license renewal. After notice and comment rulemaking, the Commission promulgated in 1981 a rule that dramatically pared down the license renewal procedures for broadcast licensees. In particular, the Commission eliminated its long-standing practice of requiring all renewal applicants to provide the Commission with substantial information about their programming during the prior license term. Petitioners' challenge springs from this decision to eliminate individualized programming inquiries from the renewal process. They assert that this decision contravenes the substantive requirements of the Communications Act, 47 U.S.C. § 151 *et seq.* (1976 & Supp. V 1981), and is not the product of reasoned decisionmaking as required by Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). The majority opinion upholds the Commission's decision in the face of these challenges.

I dissent. The mandates of the statutory language of the Communications Act, understood in light of the premises and purposes of the regulatory scheme that Congress established in the Act, require the Commission to investigate the programming of each applicant for renewal of a broadcast license. It is a fundamental premise of the Act that the public, and not the broadcaster, owns the airwaves. Under the regulatory scheme, a broadcaster receives free and exclusive use of a slice of this public

resource, the remunerative potential of which has proven to be vast. In return, the broadcaster must use this public resource so as to serve the "public interest, convenience, and necessity." 47 U.S.C. §§ 303, 307, 309, 315. This public interest standard mandates programming that meets the needs of a broadcaster's viewing or listening community. *See* Part III-A *infra*. The statute establishes the Commission as the overseer of this relationship between the broadcaster and its viewing or listening public. The Commission exercises this oversight primarily through the renewal process. To fulfill its responsibility the Commission had traditionally required each renewal applicant to provide information sufficient to permit the Commission to determine whether the applicant had met its public interest programming obligations. Only by making such an individualized inquiry into the programming of every renewal applicant can the Commission abide by the statutory mandate that it "*shall* determine, in the case of *each application* filed with it * * *, whether the public interest * * * will be served" by renewal. 47 U.S.C. § 309(a) (emphasis added). The Commission's recent decision to forsake programming inquiries amounts to an abdication of its statutory responsibilities, and this court should invalidate the Commission's plan.

I. Background

A. *The Commission's Traditional Approach to Renewal of Broadcast Licenses*

Traditionally, programming inquiries have been central to the renewal process under the Communications Act. Sections 307 and 309 of the Act, 47 U.S.C. §§ 307, 309, direct the Commission to grant license renewals only to applicants who have provided service in the public interest. Until its recent turnabout, the Commission had always thought that this statutory directive mandated an inquiry into programming of every renewal applicant.

The Commission first set out this understanding in its "Blue Book" of 1946, REPORT ON PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 11-12 (1946). The Blue Book states that "there can be no doubt that Congress intended the Commission to consider overall program service in processing applications," and that the Commission is "under an affirmative duty, in its public interest determinations, to give full consideration to program service." *Id.* Fourteen years later the Commission restated its commitment to the necessity of programming inquiries in its *Report and Statement of Policy Re: En Banc Programming Inquiry*, 44 FCC 2303 (1960) (hereinafter *En Banc Programming Inquiry*). This policy statement recognized that the licensee's public interest obligations required it to "render the best practicable service to the community reached by [its] broadcasts," *id* at 2311, and that this service encompassed a "diligent * * * effort * * * to discover and fulfill the tastes, needs and desires" of the broadcaster's community. *Id.* at 2312. The Commission also acknowledged its own duty to "provide reasonable assurance to the public that the broadcast service it receives is such as its direct and justifiable interest requires," *id.* at 2313, and noted that the "particular manner in which applicants are required to depict their proposed or past broadcast policies and services * * * may * * * have significant bearing upon the Commission's ability to discharge its statutory duties * * *." *Id.* at 2317. These findings led the Commission to propose that licenseees be required to include in renewal applications both the way in which they had ascertained community needs and interests and the nonentertainment programming that they had presented to respond to those needs and interests. *Id.* at 2316-2317.

In 1965 the Commission revised its renewal application for radio stations to implement the findings of the 1960 *En Banc Programming Inquiry*. *See Amendment of Section IV of Broadcast Application Forms 301, 303, 314,*

and 315, 1 FCC2d 439 (1965) (hereinafter *AM-FM Program Form*). And in 1966 the Commission similarly amended its renewal application for television stations. *See Amendment of Section IV of Broadcast Application Forms 301, 303, 314, and 315*, 5 FCC2d 175 (1966). In both cases the new renewal application required licensees to provide detailed nonentertainment programming information.

The Commission again revised its renewal applications in 1973. *See Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*, 43 FCC2d 1 (1973). This revision required television licensees to fill out an annual program form that focused on the licensee's annual nonentertainment programming, and to maintain the form in a file open to public inspection. The 1973 revision also required more detailed information on the renewal applicant's efforts to ascertain community needs, its programming responsive to these needs, its programming directed to those under twelve years of age, and its commercial practices. *See* Appendix B to brief of petitioners Black Citizens for a Fair Media *et al.*

Two years later the Commission conducted yet another rulemaking to revise its renewal applications. *See Revision of FCC Form 303, Application for Renewal of Broadcast Station License, Notice of Inquiry and Proposed Rulemaking*, 52 FCC2d 184 (1975). This proceeding led one year later to a revised application that significantly reduced the number of particular areas into which the renewal application inquired. *See Revision of FCC Form 303, Application for Renewal of Broadcast Station License*, 59 FCC2d 750 (1976) (hereinafter *FCC Form 303*). The Commission stressed, however, that this simplification of the renewal form was intended only to permit the Commission to focus on program categories "particularly relevant to [its] public interest determination," *id.* at 769, and that no diminution in the Commis-

sion's statutory duty to make a public interest finding for each renewal applicant was implied.[1]

Thus, immediately prior to the rulemaking proceedings that resulted in the rule challenged in this case, the Commission's renewal application forms continued to place substantial emphasis on licensee nonentertainment programming.[2]

B. *Procedural History of the Commission's New Plan*

On July 11, 1980 the Commission issued a notice of proposed rulemaking to consider possible revision of the license renewal process. *Notice*, *supra* note 2, JA 47. In this proposed rulemaking the Commission, bringing its deregulatory credo to bear on the renewal process, sought to reduce the substantial filings that had been required of all renewal applicants. It stated its rationale for this policy:

---

[1] The Commission stated:

> In each case involving a renewal application the Commission is required to review the licensee's overall performance during the preceding license term and to make an affirmative finding that grant of the subject application would serve the public interest, convenience, and necessity. * * *
>
> * * * Sufficient information upon which to assess the licensee's performance and to predicate the required public interest finding must continue to be elicited. * * *

FCC Form 303, 59 FCC2d at 752.

[2] The application forms varied somewhat for different types of licensees. The application for commercial television stations was 21 pages long. The application for noncommercial television and radio stations was 15 pages long. And the application for commercial radio stations was only two pages long, but when attachments were added as required even this form was a "substantial filing." *See Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensees*, FCC 80-327 (July 11, 1980) (hereinafter *Notice*), Joint Appendix (JA) 47.

> Our experience has shown that most licensees meet or exceed our operating guidelines * * *. Indeed, we have found that the best vehicle for bringing violations to our attention has been public participation in our processes through petitions to deny, informal objections, and complaints. Therefore, it appears that our current approach to renewals may place a largely unnecessary paperwork and administrative burden on the licensees and the Commission. We therefore question the need to continue the in-depth renewal filings * * *. * * *

Notice at 2, JA 48.

In light of these beliefs, the Commission proposed a dramatic revision in the renewal process. The Commission proposed in particular that the in-depth renewal applications be scrapped and replaced with the following four-part scheme:

> (1) All licensees would be required to complete a simplified renewal application. This application would be *postcard size* and would ask four brief questions concerning the applicant's compliance with the alien ownership, equal employment opportunity, good character, and public file requirements of the Act.
>
> (2) Long-form audits, which would closely resemble former application forms, would be sent to a random sample of five percent of all licensees. These forms would contain detailed programming inquiries.
>
> (3) On-site inspections would be conducted on approximately 16 percent of licensees. Inspections would check compliance with the Act's technical requirements and with public file requirements.
>
> (4) Licensees would continue to maintain a public file that contained information regarding the licensee's ascertainment of community needs, its promises of programming to meet those needs, and its programming performance. This public file would facilitate public complaints regarding insufficient licensee programming.

See Notice at 3-15, JA 49-61.

This scheme embodies a distinct shift away from the individualized review of programming practices that the Commission had for so long thought the Act required. Under the new plan [3] the Commission would rely on a combination of deterrence through the threat of audit or inspection and public vigilance, facilitated by information in the licensees' public files, to ensure that licensees programmed in the public interest. If the Commission were to receive a public complaint, or if the postcard application, long-form audit, or on-site inspection were to turn up evidence of programming inadequacy, the Commission would make an individualized inquiry into the licensee's programming. Otherwise the Commission would presume licensee compliance with programming requirements.

C. *The Decision to Adopt the New Plan*

After receiving and considering comments from more than 100 parties, the Commission approved the postcard renewal plan in a form essentially identical to that originally proposed. *Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 49 Rad. Reg. 2d (P & F) 740 (1981) (hereinafter *Decision*), JA 6. The Commission did modify its original proposal in two ways. First, it exempted commercial radio licensees from the group that would be subject to the long-form audit requirement. *Decision* at 648-649, JA 14-15. This action was taken in coordination with the Commission's decision to effect a substantial deregulation of commercial radio. *See Office of Communication of United Church of Christ v. FCC*, *supra*, 707 F.2d 1413. As a result of this decision, approximately 8,100 of the 10,400 holders of broadcast licenses would be exempt from the long-form audit, and this audit would thus fall on only one percent of all broadcast licensees each year. Brief

[3] In this opinion the Commission's new plan will be referred to as the "postcard renewal plan."

for petitioners at 19. Second, the Commission reduced the percentage of licensees subject to the random on-site inspections from 16 percent to 10 percent annually. *Decision* at 752, JA 18.

Approving this overhaul of the renewal process, the Commission explicitly noted that the new plan "was never intended to change our current substantive requirements for the broadcast industry, and * * * does not alter the substance of licensee obligations to serve the public interest." *Id.* at 748, JA 14. *See id.* at 741, JA 7. The Commission also expressed its belief that its "ability to make [the] public interest finding is preserved through the SRA [Simplified Renewal Application]." *Id.* at 748, JA 14.

After the Commission denied a petition to reconsider this decision, *Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 87 FCC2d 1127 (1981),[4] petitioners Black Citizens for a Fair Media *et al.* brought their challenge to the Commission before this court.

II. Standard of Review

The Communications Act grants to the Commission broad authority to regulate broadcasting so as to serve the "public interest, convenience, and necessity." 47 U.S.C. § 303. Providing little more than this general touchstone for guidance, Congress sought to ensure that the Commission was unfettered in its endeavors to keep astride "a field of enterprise, the dominant characteristic of which was the rapid pace of its unfolding." *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). Though the public interest standard is not a roving license to do good, and takes directive meaning from its statutory scheme, *see Office of Communication of*

[4] Henry Geller, a petitioner in this action, brought the petition for reconsideration before the Commission.

United Church of Christ v. FCC, supra, 707 F.2d at 1423-1424, the Communications Act should nonetheless be read as delegating to the Commission substantial authority for elaborating the precise meaning of the public interest standard.

When this court reviews Commission rules promulgated pursuant to such congressional delegations of power, we do not substitute our judgment for that of the Commission as to whether the rules under review are the best method of serving the public interest. Rather, we review the Commission's action to determine whether the Commission exercised reasoned decisionmaking and whether it exceeded its statutory authority. *Herwig v. Ray*, 455 U.S. 265, 275 (1982); *Gray Panthers v. Schweiker*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

The parameters of reasoned decisionmaking are readily discernible in the case law. The mandate of the Administrative Procedure Act (APA) that a reviewing court set aside agency action found to be "arbitrary, capricious, or an abuse of discretion," 5 U.S.C. § 706 (2)(A), requires the court to ensure that the agency's decision "is rational, has support in the record, and is based on a consideration of relevant factors." *Telocator Network of America v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982). *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Office of Communication of United Church of Christ v. FCC, supra*, 707 F.2d at 1424-1426.

APA's requirement that agency action not be "in excess of statutory * * * authority," 5 U.S.C. § 706(2)(C), is more murky in its parameters. Essentially, the reviewing court must ensure that the agency action at issue comports with congressional intent; agency action inconsistent with congressional intent exceeds the limits of an agency's delegated authority. *See Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650,

655-656 (D.C. Cir. 1983); *Office of Communication of United Church of Christ v. FCC*, *supra*, 707 F.2d at 1422-1424.

That this principle is not altogether clear from the case law is largely the result of the distortive gravitational pulls of two opposing platitudes. Pulling in one direction is the maxim that a reviewing court should defer to an agency's interpretation of its governing statute. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965). Exerting a countervailing pull is the maxim that courts are always the final authorities on issues of statutory construction. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). Though both are in a sense correct, neither as formulated is sufficiently sensitive to the salient differences among situations in which a reviewing court must evaluate an agency interpretation of its governing statute. And though both have been at times applied to the process of deciding whether agency action has exceeded statutory authority, neither governs review under this test, as properly understood.

In every case in which a court reviews an agency interpretation of its governing statute, the court must decide in the first instance whether the agency or the court should supply the meaning of the statutory term at issue. The intent of Congress governs this decision. *Nat'l Wildlife Federation v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982); *Process Gas Consumers Group v. U.S. Dep't of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (*en banc*). If Congress has delegated to an agency the task of elaborating the meaning of a statutory directive, then a reviewing court must accept the agency interpretation if it is not arbitrary or capricious or in excess of statutory authority. *See NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 126-127 (1944). It remains for the reviewing court in the first instance to exercise full powers of statutory interpretation to determine whether Congress delegated the norm-elaboration function to the

agency, and in this sense the court is the final authority on issues of statutory construction. But once the court has determined that Congress has made such a delegation, the court may not substitute its judgment for that of the agency as to whether the agency's action expresses the "best" understanding of the statutory term.[5]

This does not, however, exhaust the court's interpretive responsibility. Even when a court has decided that Congress delegated to the agency the task of supplying the meaning of a statutory term, the court must still ensure that the meaning supplied does not contravene congressional intent. Implicit in every congressional delegation of power to interpret a statutory term is the limit that the agency interpretation be consistent with the congressional purposes expressed in the statutory scheme containing the term at issue. Section 10 of the APA mandates review to police this limit; the court must ensure that agency action is not "in excess of statutory * * * authority." 5 U.S.C. § 706(2)(C). Since every agency rule or decision presumptively carries the implicit message that the agency views it as consistent with congressional intent, the court should not defer to the agency view on this issue. Deference would amount to granting the agency a license to chart the bounds of its own power.[6]

---

[5] *See generally* Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 25-34 (1983) ("Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency.").

[6] As Justice Jackson once argued:

> [A]dministrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts * * *. * * *

SEC v. Chenery Corp., 332 U.S. 194, 215 (1947) (Jackson, J., dissenting).

Instead the reviewing court must itself evaluate the statute and its legislative history to determine whether the agency action at issue comports with the intent of Congress. Reviewing courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is *always* properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965) (emphasis added). *See Volkswagenwerk Aktiengelsellschaft v. FMC*, 390 U.S. 261, 272 (1968) (*quoting NLRB v. Brown, supra*, 380 U.S. at 291).

Recent Supreme Court cases have affirmed this principle in cases involving review of agency rules made pursuant to explicit congressional delegations of power to elaborate the meaning of a statutory term. Applying the "in excess of statutory * * * authority" standard of Section 10 of the APA, the Court in every case measured the agency rule against the Court's interpretation of congressional intent. *Herwig v. Ray, supra*, 455 U.S. at 275-276; *Gray Panthers v. Schweiker, supra*, 453 U.S. at 44, 45-46; *Batterton v. Francis, supra*, 432 U.S. at 428 (Administrator "could not, for example, pass a regulation that would * * * defeat the purposes of the * * * program"). *See also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) ("As we see it, the Commission's Policy Statement is in harmony with" cases defining the purposes of the Communications Act.); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973) (application of agency guideline found to be inconsistent with congressional intent); *Morton v. Ruiz*, 415 U.S. 199, 234-237 (1974) (agency rule placing geographical limit on eligibility of potential beneficiaries of statute must be consistent with congressional intent); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316-317 (1965) (no fair

construction of statute permits agency interpretation of statutory term).

Thus, review under the "in excess of statutory * * * authority" standard requires the court neither to defer to the agency interpretation nor to exercise completely independent judgment as to the statutory term at issue. Rather, the court measures the agency's interpretation of the term against the court's interpretation of congressional intent. If the court finds the agency reading consistent with congressional intent, the court's inquiry is over; the court does not determine whether the agency interpretation is the best path to the goals Congress set. If, however, the reviewing court finds that the agency interpretation contravenes a statutory mandate or frustrates congressional purposes underlying a statute, the court is duty bound to invalidate the agency interpretation.

In the present case Congress has left to the Commission much of the authority for elaborating the meaning of the public interest standard. Pursuant to this delegated power, the Commission has promulgated the postcard renewal plan that petitioners challenge in this proceeding. On review this court must determine whether the postcard renewal plan is consistent with the statutory mandates and underlying congressional purposes of the Communications Act. If this court finds that the plan contravenes the intent of Congress, we must follow the command of Section 10 of the APA and invalidate the plan because it is "in excess of statutory * * * authority."[7]

III. Review of the Merits

In this case petitioners Black Citizens for a Fair Media *et al.* make the straightforward claim that the Commis-

[7] Because I would hold that the postcard renewal plan fundamentally contravenes congressional intent, I would not reach the issue of whether the Commission's plan was the product of reasoned decisionmaking.

sion's postcard renewal plan contravenes the intent of the Communications Act because the plan does not require the Commission to ensure that each renewal applicant has met the Act's public interest programming requirements. This court must analyze the statutory mandates and underlying congressional purposes of the Communications Act to determine whether the Act places on the Commission the affirmative duty of examining the programming of every renewal applicant. If the postcard renewal plan is found to frustrate congressional intent, it must fail.

A. *The Public Trust Concept*

A broadcasting license is a public trust. The licensee obtains "the free and exclusive use of a valuable part of the public domain," and in return assumes a duty to serve the public interest by this use. *See Office of Communication of United Church of Christ v. FCC*, 359 F.2d 997, 1003 (D.C. Cir. 1966) (hereinafter *United Church I*). Congressman White, a sponsor of the original Radio Act that became the Communications Act in 1934, articulated this understanding more than half a century ago on the floor of the House of Representatives: "The right of the public to service is superior to the right of any individual * * *. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (remarks of Rep. White). Amending the Communications Act in 1959, Congress reaffirmed that the public trust concept is the animating principle of the Act. The Senate report accompanying the amendment stated: "Broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest." S. Rep. No. 562, 86th Cong., 1st Sess. 8 (1959). And the public trust concept has long guided courts interpreting the Act. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-377

(1969) (hereinafter *Red Lion*); *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) (hereinafter *United Church II*); *United Church I*, *supra*, 359 F.2d at 1003. These courts have recognized that licensees are "temporary permittees—fiduciaries—of a great public resource * * *," *United Church II*, *supra*, 425 F.2d at 548, whose public trustee status is "subject to termination for breach of duty." *United Church I*, *supra*, 359 F.2d at 1003.

The public interest standard imposes a programming obligation on licensees. Though the paucity of illuminative legislative history accompanying the original Communications Act did not make this requirement entirely clear, subsequent judicial, congressional, and agency interpretations have clarified the existence and attributes of the programming requirement. In the landmark *Nat'l Broadcasting Co. v. United States*, *supra*, 319 U.S. 190, Justice Frankfurter, writing for the Court, held that the regulatory scheme established in the Act necessarily implied a duty to inquire into licensee programming.[8] Subse-

[8] The opinion stated:

> [W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. * * *
>
> * * * *
>
> * * * "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U.S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is finan-

quent Congresses have added their imprimatur to this reading of the Act. In the course of amending the Act's equal time provision, 47 U.S.C. § 315, in 1959 to exempt candidate appearances on news broadcasts, Congress was careful to state that this new law did not relieve broadcasters of "the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Act of Sept. 14, 1959, Pub. L. No. 86-271, § 1, 73 STAT. 557, amending 47 U.S.C. § 315(a). This language, as the Supreme Court noted in *Red Lion*, *supra*, reveals that the amending Congress read the public interest standard as obliging licensees to meet certain programming requirements.[9] The Commission

---

cially and technically qualified to operate a station? Since the very inception of federal regulation [of] radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." * * *

Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 215-217 (1943).

Commentators have also recognized that the structure of the Act's regulatory scheme, governed by the public trust concept, necessarily implies the power to examine licensee programming. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 374 (1979) ("Surely a Commission asked to award licenses in the public interest must have 'good programming' as some kind of objective; to ignore programming entirely would make a mockery of its mission.").

[9] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969) ("public interest" creates programming duty); *see Banzhaf v. FCC*, 405 F.2d 1082, 1095 n.49 (D.C. Cir. 1968) ("At the very least, this language appears to be an acknowledgment of and acquiescence in the settled Commission and judicial construction that the public interest standard applies to program content."). Such subsequent congressional declarations of the intent of an earlier Congress are normally entitled to "great weight in statutory construction." *Red Lion*, *supra*, 395 U.S. at 380; *accord*, *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

itself has repeatedly articulated its understanding that a programming obligation inheres in the public interest standard.[10] And in the companion to this case, *Office of Communication of United Church of Christ v. FCC*, *supra*, 707 F.2d at 1426-1430, we reaffirmed that the Commission is correct in this understanding.

Though its precise contours are not fully mapped, the programming aspect of the public interest obligation essentially requires the licensee to provide nonentertainment programming that responds to the needs of the licensee's broadcast community. *Id.*[11] The Communications Act directs the Commission to police licensees to

---

[10] *See, e.g., En Banc Programming Inquiry*, 44 FCC 2303 (1960); *Television Program Form*, 5 FCC2d 175 (1966); *Renewal of Broadcast Licenses*, 44 FCC2d 405 (1973); *FCC Form 303 Report and Order*, 59 FCC2d 750 (1976). *See also* FCC policy statements discussed in *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1429 n.50 (D.C. Cir. 1983). Congress has never overturned, or even questioned, this consistent administrative interpretation of the Act. This congressional acquiescence constitutes persuasive evidence that the Commission's interpretation is the one intended by Congress. *See, e.g., Haig v. Agee*, 453 U.S. 280, 300 (1981); *Red Lion*, *supra* note 9, 395 U.S. at 381-382; *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

[11] Broadcasters must also meet programming obligations under the fairness doctrine. That doctrine requires broadcasters to provide coverage of controversial and important issues and to present opposing points of view on controversial issues. *Red Lion*, *supra* note 9, 395 U.S. at 377-378. These requirements originally grew out of the general public interest obligation of the Communications Act. *See* S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 16-56 (1978). *Red Lion* held that when Congress amended the Act in 1959 it specifically intended to codify the fairness doctrine as a statutory requirement. 395 U.S. at 380-385. Though there is a significant overlap between the programming requirements of the first part of the fairness doctrine and those of the general public interest programming standard, *see* note 17 *infra*, these requirements are theoretically distinct.

ensure that they meet their public interest obligations. *See* 47 U.S.C. §§ 303, 307, 309, 315. Reviewing a licensee's renewal application, the Commission must therefore determine whether the licensee has fulfilled these obligations to program in the public interest. The licensee in a renewal proceeding must "literally run on his record." *United Church I, supra*, 359 F.2d at 1007.

B. *The Postcard Renewal Plan*

The Commission acknowledges that "[a] broadcaster seeking renewal must run on his record, *and the focus of that record is whether his programming has served the public interest.*" Brief for respondents at 14 (emphasis added). Yet the Commission's postcard renewal plan eliminates from the standard renewal application form *all* questions relating to programming. The tension between the Commission's words and its deeds is obvious; while admitting that past programming is central to the renewal decision, the Commission proposes a scheme that makes no individualized inquiry into the programming of renewal applicants. The Commission seeks to resolve this tension with an argument of the "have your cake and eat it too" variety. What the Commission claims is that the Act imposes on it only a duty to find that each applicant operates in the public interest—not specifically to inquire into each applicant's programming—and that the system of random audits and spot checks, supplemented by complaints from the public, will deter most potential violators of the programming obligation, flag those not deterred, and thereby ensure that licensees program in the public interest while eliminating unneeded paperwork. Given this alternative way of ensuring that programming requirements are met, "[t]he questions contained on the SRA [Simplified Renewal Application] would provide the Commission with adequate information to make its public interest finding consistent with the Communications Act." *Decision* at 743, JA 9.

The rationale for this dramatic shift in the Commission's approach to enforcement is not without some allure. The Commission asserts that under the prior renewal system, which inquired deeply into licensee programming, almost all renewal applicants were found to have met the programming requirements. Moreover, complaints from the broadcaster's community are currently the primary means by which the Commission learns of broadcaster failure to meet programming requirements. Based on these facts, the Commission determined that a combination of deterrence through the threat of audit or inspection and reliance on public complaints would suffice to ensure that licensees programmed in the public interest. Thus, although a licensee would still run on its record at renewal time, the Commission would presume, absent public complaint, that the audit and inspection threat had exerted a deterrent force sufficient to have kept the license faithful to its programming obligations as a public trustee.

C. *The Statutory Mandate and Underlying Congressional Purposes*

To ascertain whether the Commission has exceeded its statutory authority, the postcard renewal plan must be measured against the explicit statutory commands of the Communications Act, understood in light of underlying congressional purposes.

The Communications Act concentrates the Commission's regulatory efforts at the renewal stage; the renewal decision is the crucible of the regulatory process. Section 307(d) permits renewal "if the Commission finds that public interest, convenience, and necessity would be served thereby." 47 U.S.C. § 307(d). Section 308(b) grants the Commission broad power to require renewal applicants to provide whatever the Commission needs to make its public interest finding. *Id.* § 308(b). And Section 309(a) is most explicit in its requirement that "the

Commission *shall* determine, in the case of *each* application filed with it * * *, whether the public interest * * * will be served by the granting of such application." *Id.* § 309(a) (emphasis added). These words impose on the Commission a mandatory duty to make sure that each renewal applicant has operated in the public interest. *FCC v. WNCN Listeners Guild*, *supra*, 450 U.S. at 600 ("the Commission does not merely assume but affirmatively determines that the requested renewal * * * will serve the public interest").[12] When these sections are read together with the programming requirement that the public interest standard imposes on each licensee, it becomes clear that the statutory scheme requires the Commission to find that each renewal applicant is providing programming that satisfies the public interest standard.

Reviewing courts have consistently read the statute in exactly this way. In *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735 (D.C. Cir. 1976), this court noted that "it has long been basic to the understanding of the renewal process by both Congress and the Commission that a licensee runs on his past record." We similarly found in *United Church I*, *supra*, that "in a renewal proceeding past performance is [the Commission's] best criterion." 359 F.2d at 1007. *See also id.* at 1005 ("on a renewal application the 'campaign pledges' of applicants must be open to comparison with 'performance in office'"); *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 326 (D.C. Cir. 1974) ("a renewal applicant must 'run on his record' in demonstrating that his past performance has been responsive to the needs of his broadcast area").

---

[12] The statute's use of the word "shall" presumptively implies that Congress intended to impose a mandatory duty upon the Commission. *See Ass'n of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977). *See generally* C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 57.03, at 415-417 (4th ed. 1973).

In those cases the court was doing no more than following a long-standing Commission interpretation. Almost a quarter-century ago, in *En Banc Programming Inquiry*, 44 FCC 2303, 2310 (1960), the Commission set out this interpretation of the Act:

> [F]aithful discharge of its statutory responsibilities is absolutely necessary in connection with the implacable requirement that the Commission approve no such application for licenses unless it finds that "public interest, convenience, and necessity would be served." While the public interest standard does not provide a blueprint of all of the situations to which it may apply, it does contain a sufficiently precise definition of authority so as to enable the Commission to properly deal with the many and varied occasions which may give rise to its application. *A significant element of the public interest is the broadcaster's service to the community.* * * *

(Emphasis added.) The policy statement bears repeating: the statute requires that "no * * * application" be approved unless the Commission finds that the public interest would be served, a "significant element" of which is the "broadcaster's service to the community." The identical interpretation of the statute permeates later Commission rules and policy statement. *See AM & FM Program Form*, 1 FCC2d 439, 440 (1965); *Comparative Hearings on Renewal Applicants*, 22 FCC2d 424, 426 (1970) ("the past record of the renewal applicant is still the critical factor"). Perhaps the strongest rendition of this interpretation is contained in *FCC Form 303*, *supra*, 59 FCC2d at 752. In that rulemaking proceeding the Commission sought to simplify the renewal application then in use by removing duplicative or irrelevant requests for information. In doing so, however, the Commission explicitly recognized that the Communications Act places upon it a statutory duty to evaluate the programming performance of each renewal applicant:

> *In each case* involving a renewal application *the Commission is required to review the licensee's overall performance* during the preceding license term *and to make an affirmative finding that grant of the subject application would serve the public interest, convenience, and necessity.* • • •
>
> • • • *Sufficient information upon which to assess the licensee's performance* and to predicate the required public interest finding *must continue to be elicited.* • • •

Id. at 752 (emphasis added). These quotations from Commission rules and policy statements leave little doubt that, prior to its recent about-face, the Commission consistently read the Act as mandating an inquiry into the programming of each and every renewal applicant.[13]

That the Commission for so long held this view of the Act is not surprising. This reading reflects the centrality of the "public trust" concept that animates the regulatory scheme. Each licensee receives a slice of the public domain extraordinarily lucrative in its potential, and must in return provide programming that serves the needs of its broadcast community. The Act directs the Commission to ensure that each licensee meets its obligations as a public trustee. The Act, furthermore, makes explicit the requirement that an affirmative, individualized public interest finding be made for each licensee. Since

---

[13] Additional evidence that the Commission read the statute this way can be found in statements contained in FCC license renewal applications. Application forms from 1974, 1976, and 1980 contain the following language:

> Pursuant to the Communications Act of 1934, as amended, the Commission cannot grant, renew or modify a broadcast authorization unless it makes an affirmative finding that the operation of the station, as proposed, will serve the public interest, convenience and necessity. Programming is of the essence of broadcasting.

Appendix B to brief for petitioners Black Citizens for a Fair Media *et al.* at 33, 54, 70.

the Commission carries out this statutory duty primarily through the renewal process, the process must be structured to permit the Commission to ensure that each licensee lives up to its public trust obligations. The Commission can only do so by evaluating the programming of each licensee. To further the congressional purposes implicit in the public trust concept, the affirmative, individualized public interest finding that Sections 307 and 309 of the Act mandate must be read as requiring the Commission to evaluate the programming of each renewal applicant.[14]

---

[14] Long congressional acquiescence in this consistent agency and judicial interpretation provides persuasive evidence that this interpretation is the one intended by Congress. *Haig v. Agee*, *supra* note 10, 453 U.S. at 300; *Red Lion*, *supra* note 9, 395 U.S. at 381; *Zemel v. Rusk*, *supra* note 10, 381 U.S. at 11. *Haig v. Agee* stated that "congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy." 453 U.S. at 300. More recently, however, the Supreme Court stressed, in *Bob Jones University v. United States*, —— U.S. ——, ——, 51 U.S.L.W. 4593, 4600 (May 24, 1983), that an important factor in determining the weight to be given congressional acquiescence in an agency interpretation is the extent of Congress' familiarity with that interpretation.

In the present case, evidence exists of congressional familiarity with, and approval of, the Commission's understanding that the Communications Act mandated an inquiry into the programming of each renewal applicant. Some evidence is contained in the House report accompanying H.R. 12993, a bill that passed House and Senate in different forms during the 93rd Congress but was never reconciled and enacted into law. This bill proposed alterations in the programming inquiries for renewal applicants. The House report indicated a clear belief that under "existing law" the "ultimate test" for renewal was whether the licensee had met public interest programming requirements, and stated that the bill sought only to amend the particulars of the programming inquiry. *See* H.R. Rep. No. 93-961, 93d Cong., 2d Sess. 16-17 (1974).

Moreover, Congress has on several occasions over the years amended the Communications Act, and at no time during any

What is surprising, rather, is that the Commission would now seek to undermine this understanding of the Act—and that the majority of this panel would go along. The Commission attempts to achieve its goal of rewriting the statute by a process of recharacterizing its earlier view of its statutory responsibilities. The Commission now claims that when it stated previously that programming inquiries were essential to the renewal process, it was not interpreting the statute *per se*, but merely exercising its broad discretion to propound whatever procedures it thought appropriate under the public interest standard. Now in an equally permissible exercise of discretion, the Commission claims, it is discarding the old programming inquiries as cumbersome and replacing them with the postcard renewal plan. To support this shift in approach the Commission claims that the statute does not mandate a renewal form that inquires into the programming of each applicant and that the random audits and inspections, supplemented by public complaints, will permit the Commission to meet its duty of ensuring

---

amending process did Congress express disapproval of the long-standing Commission interpretation of the Act as requiring individualized programming inquiries. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982). Similarly, when Congress amended § 307 of the Act in 1952, it not only refused to alter the Commission's understanding of the public interest renewal standard embodied in that section, *see* Part I-A *supra*, but it also explicitly stated that it intended no change in the Commission's "*duty* to consider, in the case of a station which has been in operation and is applying for renewal, the over-all performance of that station against the broad standard of public interest, convenience, and necessity." S. Rep. No. 44, 82d Cong., 1st Sess. 7 (1951) (emphasis added). Thus it is clear that Congress has been aware of the Commission's traditional interpretation of the Act, has acquiesced in that interpretation, and has on occasion articulated its explicit concurrence with that interpretation.

programming in the public interest. Neither prong of the Commission's rationale withstands analysis.

1. *The statute requires a programming inquiry.*

Both the Commission and the majority opinion here assert that the Communications Act does not require the Commission's renewal application to inquire into each applicant's programming. Casting the issue in this way, they avoid the real question that must be answered in this case: whether the Commission can, consistent with the Communications Act, make no inquiry into the programming of 99 percent of its renewal applicants. Without a doubt, the precise content of the renewal application form is left largely to the discretion of the Commission. But it does not follow from this proposition that the Commission need not review the programming of each renewal applicant. The Commission's plan is only valid if the Act does not mandate such individualized inquiry. Thus, even if the Commission can show that the statutory words do not explicitly require a renewal application with programming questions, the Commission has not thereby proven that the statutory scheme does not require an inquiry into the programming of each renewal applicant. The reasoning of this court's majority opinion is directed only toward proving the former, and therefore does not address itself to the critical issue in this case.

Nonetheless, since the Commission's plan does not provide for an examination of the programming of each renewal applicant, it must be assumed that the Commission and the majority here have implicitly decided that the Act does not mandate such individualized inquiry. It has already been demonstrated that this view flatly contradicts the position that the Commission has held and expounded for at least the past 40 years. To the extent that this court's analysis can be viewed as implicitly addressed to this underlying issue of whether the Act mandates an

inquiry into each applicant's programming, that analysis also falls of its own weight.

The majority correctly notes that nothing on the face of the Act explicitly requires that programming inquiries be included on all applications for renewal. Majority Opinion (Maj. Op.) at 9. Section 308(b), a non-exhaustive list of items into which the Commission may inquire, is the centerpiece of this argument. The section does not include programming inquiries on its list, and does leave the Commission with discretion as to what information it may require licensees to supply. Yet to extrapolate from these words a holding that the Commission need not inquire into programming is to resurrect the discredited "plain meaning rule" in its worst aspect. *See United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940). Section 308 must take its meaning from the regulatory scheme of which it forms a part, and from the purposes and animating concepts of the statute. In Section 308 Congress intended to give the Commission the ability to solicit all information *"it may require,"* 47 U.S.C. § 308(b) (emphasis added), to carry out its affirmative obligation of ensuring that each renewal applicant has operated in the public interest. The grant was undoubtedly phrased in these general terms not to permit the Commission to inquire or not as it saw fit, but to ensure that the statute implied no limitations on the Commission's power to gather all needed information. Since the statutory scheme requires the Commission to ensure that each applicant has met its public interest programming obligations, Section 308 cannot be read as giving the Commission the authority to nullify this mandate in the name of convenience.[18]

---

[18] *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976), should not be read as indicating a contrary result. The case was based on a narrow holding that the Commission need not inquire into the financial fitness of applicants for licenses to operate land mobile radio services if the Commission "deems [such information] irrele-

The majority draws similarly faulty lessons from its thin reading of subsequent congressional and agency interpretations of the Act. In the 1952 amendments to the Act, on which the majority places significant weight, Congress did seek to "reduce the regulatory burden," Maj. Op. at 10, but not in the way that the majority claims. Prior to the amendments the Act required that renewal applications "be limited to and governed by the same considerations and practice which affects the granting of original applications." The amendment substituted for this yardstick the broader "public interest" standard that is now in Section 307. This revision eased the regulatory burden by freeing the Commission from making inquiries that, while sensible when addressed to initial applicants for licenses, were not sensible when addressed to renewal applicants. For example, the pre-1952 practice required the Commission to consider the financial ability of both initial and renewal applicants to construct a broadcast station. A renewal applicant, however, would already have built the station, and inquiry into its financial ability to do so would thus be senseless. *See* S. Rep. No. 44, 82d Cong., 1st Sess. 7 (1951).

These eminently reasonable statutory adjustments cannot be read to support the majority's extravagant claim that Congress "wanted to * * * grant the FCC discretion to tailor the renewal form as it saw fit." Maj. Op. at 10. And not only this logic, but also a page of history refutes the majority's interpretation. According to the Senate report, the amendment to Section 307 "does not

---

vant to its statutory scheme." 525 F.2d at 645. In discussing § 308(b) the opinion did state that the statutory language "leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate * * *." *Id.* But this overbroad dictum was immediately qualified by the statement that the Commission can only ignore those factors it considers irrelevant to the statutory scheme. *Id.* No such claim could be made about programming inquiries in the present controversy.

in any way impair the Commission's right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the over-all performance of that station against the broad standard of public interest, convenience, and necessity." S. Rep. No. 44, *supra*, at 7.[16]

The majority also relies on two aspects of agency practice under the statute to support its holding: (i) the Commission's frequent addition and subtraction of questions on renewal forms, and (ii) the Commission's policy of policing compliance with the fairness doctrine on an *ad hoc* basis, rather than through renewal applications. In each case the majority's reliance is misplaced.

Though the Commission has frequently modified the questions on its renewal applications, in every case these modifications merely refined the methods of inquiry by which the Commission assured itself that renewal applicants had met programming requirements. *See* Part I-A *supra*. In its 1975 revision, which greatly simplified the renewal application, the Commission articulated the understanding of the statute that guided its revision process:

> • • • [W]e cannot, in the interest of alleviating the paperwork burden faced by our licensees, pay only lip service to our statutory responsibilities. Our re-regulatory goal is the improvement of the renewal process through the clarification and refinement of our reporting requirements and the elimination of antiquated and unnecessary disclosures. Sufficient information upon which to assess the licensee's performance and to predicate the required public interest finding must continue to be elicited. • • •

---

[16] If anything, the 1952 amendment facilitated broader inquiry into programming. Since, under the prior statute, new and renewal applicants had to be evaluated under identical criteria, and new applicants would have no programming to measure, a renewal applicant in theory could not have its programming evaluated.

FCC Form 303, *supra*, 59 FCC2d at 752. The power to refine renewal inquiries is certainly within the Commission's discretion, and the majority is correct when it states that "if the FCC can add specific questions, it can delete them when circumstances warrant." Maj. Op. at 11. But it does not follow from that proposition that the Commission can eliminate *all* programming inquiries and substitute nothing in their place. Only legerdemain can transform the Commission's discretion to refine the renewal process into the power to obliterate its core function.

Nor does the Commission's policy of *ad hoc* enforcement of the fairness doctrine support the majority's position that the Commission may eliminate all programming inquiries from renewal applications. As this court noted in *Nat'l Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, 1111, 1116 (D.C. Cir. 1977), when the Commission decided to enforce the fairness doctrine on a case-by-case basis, rather than solely during the renewal process, this action *intensified* scrutiny of broadcasters. An intervenor in Commission proceedings had proposed that the Commission police compliance with the fairness doctrine through renewals so as to minimize the "amount of government interference in the everyday editorial decisions of licensees." 567 F.2d at 1115. The Commission rejected this approach because "review only at the time of renewal would discourage the filing of specific complaints from persons who sought to present opposing views in a timely fashion and would deny the Commission the ability to 'remedy violations before a flagrant pattern of abuse develops.'" *Id.* at 1116 (*quoting Fairness Report*, 48 FCC2d 1, 18 (1974)).

The Commission was unquestionably within the bounds of its delegated power when it decided to intensify its review to meet the urgency of a fairness doctrine complaint alleging one-sided presentation of an important issue. But this power to intensify review does not imply

a concomitant power to slacken review. Moreover, the case-by-case review process was specifically tailored to meet the need of permitting a prompt response to a controversial view on a pressing issue, and thereby furthered the purposes of the Communications Act. No similar exigency justifies the Commission's present decision to relax scrutiny of licensee compliance with programming requirements, and such a step furthers no statutory purpose. Thus the majority opinion can draw no sustenance from the Commission's fairness doctrine enforcement policies.[17]

---

[17] The fairness doctrine of course comprises two obligations: (i) the broadcaster must provide coverage of controversial and important issues, and (ii) the broadcaster must present opposing points of view on controversial issues. *See* note 11 *supra*. The Commission's case-by-case enforcement process is particularly concerned with facilitating the Commission's ability to ensure that licensees abide by the requirements of the second part of the doctrine. Case-by-case enforcement is admittedly less well suited to policing the first part of the doctrine. In fact the Commission traditionally has not focused its enforcement efforts on the first part. *Nat'l Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977).

This fact should not, however, be understood as implying that the Commission is under no affirmative obligation to ensure that each licensee meets its obligations under both parts of the doctrine. The Commission's traditional practice of eliciting on renewal applications information about the extent to which a licensee's nonentertainment programming served the needs of its listeners—though directed toward the general public interest finding required for renewal—may well have permitted the Commission to ensure that licensees were meeting their obligation under part one of the fairness doctrine as well. Commentators have noted the convergence of the requirements of the fairness doctrine and the general public interest programming standard. *See, e.g.*, S. SIMMONS, *supra* note 11, at 222-228 (suggesting that part one obligations could be policed through existing license renewal procedures that focus on licensee programming in the public interest). In essence, part one of the fairness doctrine im-

The argument that the Communications Act does not impose on the Commission a duty to inquire into the programming of each renewal applicant is untenable. The statutory language, the legislative history, and the administrative practices that the majority has mustered to support this view are neither jointly nor severally able to bear the weight that the majority must necessarily put upon them to prove its point. Since the validity of the Commission's stated position that the Act does not require a renewal application with programming inquiries hinges on the validity of this unstated, but necessary, point, the Commission's plan must fall. Until the Commission's postcard renewal plan, it had been thought beyond cavil that the Communications Act mandated individual programming inquiries. The Commission cannot now rewrite the statute by claiming that for the past 40

---

poses on broadcasters a requirement that "the American public not be left uninformed," *Green v. FCC*, 447 F.2d 323, 329 (D.C. Cir. 1971), and the public interest standard requires licensees to present informational programming responsive to issues important in the licensee's community. *Office of Communication of United Church of Christ v. FCC*, *supra* note 10, 707 F.2d at 1426-1432. The large overlap in these two requirements is clear, and is not surprising in light of the fact that the fairness doctrine is a particular manifestation of the public interest standard. *See* note 11 *supra*.

The implications of this overlap are important. In the first place, the fact that the Commission in effect policed the first part of the fairness doctrine through the renewal process further undercuts the majority's argument that *ad hoc* enforcement of the fairness doctrine permits *ad hoc* enforcement of programming obligations. As a factual matter, only the second part of the fairness doctrine was policed on a case-by-case basis, and that was necessary given the need for providing swift opportunities to respond to unbalanced presentation of views on pressing issues. In the second place, the Commission's *de facto* reliance on the programming inquiries of the renewal process generates another reason for prohibiting the Commission from discarding all programming inquiries: the Commission will be unable to ensure that licensees meet their obligations under the first part of the fairness doctrine.

years when it said the Act imposed an affirmative duty to find that each renewal applicant programmed in the public interest, what it really meant was that the statute gave it discretion to decide whether or not to make such an inquiry. The Commission, the courts, and implicitly the Congress, have consistently held the contrary view. The weak reading of the statute that the majority has presented to support the Commission's new-found discretion only reconfirms that the Commission has been right for the last 40 years and is wrong now.

2. *The Commission's alternative means of regulating programming is inadequate.*

Though it eliminated individualized programming inquiries, the postcard renewal plan did acknowledge the Commission's duty under the Communications Act to ensure that licensees presented programming in the public interest. To meet this obligation the Commission proposed the trio of long-form audit, on-site inspection, and public participation. That approach would ensure programming in the public interest, the Commission claimed, because the threat of audit or inspection would provide "sufficient inducement to comply" with programming requirements, *Decision* at 750, JA 16, and because public complaints—traditionally the "best vehicle" for apprising the Commission of violations, *Notice* at 2, JA 48—would flag those broadcasters not sufficiently induced by the audit threat.

The Commission proposed this alternative enforcement scheme in coordination with its decision to eliminate all programming inquiries from renewal forms, and this alternative plan is, like the postcard renewal application itself, based on the erroneous premise that the Act does not mandate individualized programming inquiries. That the plan would require examination of the programming of so few licensees is sufficient to invalidate it as inconsistent with the mandates of the Communications Act. The plan is, moreover, riddled with illogic.

The Commission asserts that the threat of audit or inspection will provide an element of deterrence sufficient to ensure broadcasting in the public interest. And the majority opinion agrees that "the regulatory environment provides strong incentives for operation in the public interest." Maj. Op. at 17-18. In the light of the Commission's contemporaneous decision to exempt all commercial radio licensees from the audit requirement, *see Decision* at 748-749, JA 14-15, this claim is absurd. Of the 10,400 holders of broadcast licenses in this country approximately 8,100 are commercial radio licensees. *See* brief for petitioners Black Citizens for a Fair Media *et al.* at 25 (*citing* FCC, 46TH ANNUAL REPORT/FISCAL YEAR 1980 at 90). Thus virtually 80 percent of all licensees are not subject to the mechanism that the FCC claims will deter broadcaster misfeasance. The remaining 20 percent of broadcasters—commercial television and noncommercial radio and television licensees—face only one chance in 20 of being subject to the long-form audit in any given year.[18]

The Commission also contends that complaints from the viewing and listening public will pinpoint broadcasters that are not meeting public interest programming obligations. The Commission claims that since public complaints are currently the primary means by which it learns of broadcaster transgressions, it can ensure that most broadcasters program in the public interest simply by responding to such public complaints. That, however, is a *non sequitur*. Reliance on public participation to ensure that

---

[18] Ten percent of all licensees, including commercial radio stations, will be subject to the on-site inspections. *Decision* at 757, JA 23. These inspections are, however, primarily concerned with the technical aspects of broadcasting. They will involve programming only to the extent of checking the licensee's public file to make sure it contains all required programming information. *Id.* at 751-752, JA 17-18. Thus the other half of the Commission's deterrence mechanism involves a one in ten chance that a licensee will have its public file inspected in any given year.

most violators of the programming obligation are caught is only valid if it can be shown that the public complains about most violators. The Commission has not even attempted to make such a showing. And it is unlikely that it could do so. The high cost of participation, in time and money, exerts a strong constraining pressure on the public. As this court noted in another case involving the Commission's license renewal procedures: "Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation." *United Church I, supra*, 359 F.2d at 1006. Reliance on public complaints simply does not assure that most broadcasters will present programming that meets public interest obligations.

The postcard renewal plan essentially creates a presumption that a renewal applicant has met its public interest programming obligations. The plan holds out some possibility of deterrence, but the odds are long. Twenty percent of licensees, the noncommercial broadcasters and commercial television stations, face a one in 20 chance of audit and a one in ten chance of inspection of their public files. Eighty percent of licensees, the commercial radio stations, face only the one in ten risk of inspection. Most of the burden for monitoring licensee programming under this plan rests with the public. Absent public complaint, the Commission will "assume continued compliance." *Decision* at 748, JA 14.

That is the rub. This policy of assuming continued compliance with public interest obligations cannot be squared with the explicit command of the statutory scheme that *"the Commission shall determine, in the case of each application filed with it * * *, whether the public interest, convenience, and necessity will be served by the granting of such application * * *."* 47 U.S.C. § 309(a) (emphasis added). *See FCC v. WNCN Listeners Guild, supra*, 450 U.S. at 601 ("the Commission does

not merely assume but affirmatively determines that the requested renewal * * * will serve the public interest"); *United Church I, supra*, 359 F.2d at 1008 ("The statutory public interest finding cannot be inferred from a statement of the obvious truth that a properly operated station will serve the public interest."). The postcard renewal plans falls far short of the statute's mandate that the Commission ensure that each renewal applicant has presented programming in the public interest. In so doing, the plan frustrates the essential purpose of the Communications Act: assuring that the public, the owner of the airwaves, receives programming that meets community needs. Until it proposed this plan, the Commission had held the firm belief that the Act required an inquiry into the programming of each renewal applicant. The Commission was correct. The postcard renewal plan does not meet the Act's requirements, and this court errs in upholding it.

IV. Conclusion

Like many of its sister agencies, the Commission has in recent years taken up the sword against long-standing federal regulatory policies. In *Office of Communication of United Church of Christ v. FCC, supra*, 707 F.2d 1413, this court approved most of the Commission's efforts to deregulate commercial radio, but only after we conducted a careful review of the statutory scheme. Our decision hinged on a finding that the Commission's deregulatory plan left intact the statutory requirement that radio broadcasters present nonentertainment programming to meet the community needs of their audiences. 707 F.2d at 1426-1430. In the present controversy, the Commission has cut away too much. The postcard renewal plan contravenes the statutory mandates and underlying purposes of the Communications Act; under the plan the Commission does not make the statutorily required affirmative finding that each renewal applicant has presented programming in the public interest. *See* 47 U.S.C. § 309(a). In effect, the Commission has relegated itself to the role

of a traffic cop, policing to ensure that licensees meet technical requirements, but doing little more. Forty years ago, Justice Frankfurter rejected such a narrow conception of the Commission's duties under the Act: "the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." *Nat'l Broadcasting Co. v. United States*, *supra*, 319 U.S. at 215-216.

This burden has proven to be substantial. Without a doubt the postcard renewal plan makes life easier for both the regulators and the regulated. But the statute imposes this burden, and the Commission is not free to shirk it. To do so is to place administrative convenience ahead of the protection of the public interest that Congress intended in this regulatory scheme. The Commission's decision to favor administrative convenience is troubling. The decision indicates that the Commission has—like the broadcasters before it, *see United Church I*, *supra*, 359 F.2d at 1003—lost sight of the fact that a broadcast license is a public trust. The public, as owner of the airwaves, deserves more protection than the Commission's postcard renewal plan provides. The Communications Act mandates this protection in the form of an examination of the programming of each renewal applicant. This court errs in sanctioning the Commission's effort to shirk these statutory responsibilities.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1710 September Term, 1983

Black Citizens for a Fair Media, et al.
Petitioners

v.

Federal Communications and
United States of America
Respondents

United States Court of Appeals
for the District of Columbia
Filed Dec 12 1983
George A. Fisher
Clerk

American Brocasting Companies, Inc.
National Association of Broadcasters
National Radio Broadcasters Association
Office of Communication of the United
Church of Christ
CBS, Inc.
Argonaut Broadcasting Company, et al.
Intervenors

And Consolidated Case No. 81-2277

BEFORE: Wright and Bork, Circuit Judges and Jameson*, Senior District Judge for the District of Montana

ORDER

On consideration of the Petition for Rehearing of Petitioners Black Citizens for a Fair Media, et al., and Henry Geller, filed November 9, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Wright would grant the petition for rehearing.

*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1710 September Term, 1983

Black Citizens for a Fair Media, et al.
Petitioners

v.

Federal Communications and
United States of America
Respondents

United States Court of Appeals
for the District of Columbia
Filed Dec 12 1983
George A. Fisher
Clerk

American Brocasting Companies, Inc.
National Association of Broadcasters
National Radio Broadcasters Association
Office of Communication of the United
Church of Christ
CBS, Inc.
Argonaut Broadcasting Company, et al.
Intervenors

And Consolidated Case No. 81-2277

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestion for Rehearing *en banc* of Petitioners Black Citizens for a Fair Media, et al. and Henry Geller, filed November 9, 1983, has been circulated to the full court. A majority of the Court has not voted in favor of the suggestion and, accordingly, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Wright, Wilkey, Wald and Edwards would grant the suggestion. Chief Judge Robinson did not participate in this Order.

*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1710 September Term, 1983

Black Citizens for a Fair Media, et al.
Petitioners

v.

Federal Communications and
United States of America
Respondents

American Broadcasting Companies, Inc.
National Association of Broadcasters
National Radio Broadcasters Association
Office of Communication of the United
Church of Christ
CBS, Inc.
Argonaut Broadcasting Company, et al.
Intervenors

United States Court of Appeals
for the District of Columbia
Filed Oct 71983
George A. Fisher
Clerk

No. 81-2277

Henry Geller,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respodnents

National Association of Broadcasters,
Intervenor

Petitions for Review of an Order of the Federal Communications Commission

BEFORE: Wright and Bork, Circuit Judges and Jameson*, Senior District Judge for the District of Montana

JUDGMENT

These causes came on to be heard on petitions for review or orders of the Federal Communications Commis-

sion, and were argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Federal Communications Commission under review herein are affirmed, for the reasons set forth in the opinion for the Court filed herein this date.

Per Curiam
For The Court:
/s/ George A. Fisher
George A. Fisher
Clerk

Date: October 7, 1983.
Opinion for the Court filed by Circuit Judge Bork.
Dissenting opinion filed by Circuit Judge Wright.
*Sitting by designation pursuant to 28 U.S.C. § 294(d).

A true copy:
Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit
By: /s/ Irvinia McDowery, Deputy Clerk

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[BC Docket No. 80-253; RM-2858; FCC 81-146]

Radio Broadcast Services; Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees

AGENCY: Federal Communications Commission.

ACTION: Final rule.

Report and Order—Proceeding Terminated

Adopted: March 26, 1981.

Released: May 11, 1981.

By the Commission: Chairman Ferris not participating; Commissioner Fogarty concurring in the result.

1. On June 4, 1980, we adopted a *Notice of Proposed Rule Making* in this proceeding proposing a dramatic shift in our renewal procedures for broadcast licensees. FCC 80-327. We proposed to eliminate our detailed review of lengthy renewal filings and to adopt a procedure which uses a five-question simplified renewal application (SRA). We have considered the comments and reply comments filed in this proceeding and have determined that adoption of this proposal is warranted.

Summary of Action Taken

2. In the *Notice* we observed that our proposal would result in significant savings to the Commission and the industry without any diminution in the substance of licensee

service to the public. Congress had fashioned a broad standard for licensing broadcast entities. The Communications Act provides that * * * the Commission shall determine, in the case of each application filed with it * * *, whether the public interest convenience and necessity will be served by the granting of such application." 47 U.S.C. 309(a). In order to acquire the data necessary to comply with the public interest standard for renewal of license, Congress provided that applications.

> * * * shall set forth such facts as the Commission by regulation may prescribe as to citizenship, character, and financial, technical and other qualifications of the applicant to operate the station.
> 47 U.S.C. 308(b).

3. We believe that we can discharge our obligations by adopting a simplified renewal application (SRA) as the standard application for renewal of license for all commercial and noncommercial licensees. We are implementing new enforcement measures to be used in conjunction with the SRA. At least five percent of all commercial TV and noncommercial licensees will be selected at random to complete audit forms which are similar to the applications they currently file for renewal of license. A second sample of all licensees, including commercial radio, will receive on-site inspections by Field Operations Bureau (FOB) personnel. In those inspections FOB will continue its current practice of monitoring the technical compliance of broadcast licensees and will also review public inspection files to assure that licensees are complying with our requirements for making particular data concerning their operations available to the public. As a third measure, the Broadcast Bureau may conduct on-site inspections of a number of licensees who submit problem applications. Also, some Broadcast Bureau field inspections may be undertaken to

verify the data provided to us by licensees. As a separate matter, we have considered a request filed by the National Radio Broadcasters Association to simplify our requirements related to the regular and pre- and post-filing announcements made by broadcast licensees to apprise the public that they are licensed every three years to serve the public interest. Some relief in this area has been provided.

4. We are confident that this new process will prove cost-effective for the Commission. Yet, we have not adopted any changes in our technical, programming, or other substantive requirements that licensees serve the public interest. Only procedural requirements have been altered.

Background

5. Over the years, as the Commission refined its regulation of the broadcast industry, questions reflecting the implementation of new or modified rules have made their way into license renewal applications. For example, advancement from the generalized requirement that licensees know the needs of their communities set out in the 1960 *En Banc Programming Inquiry*, 44 F.C.C. 3303, to the implementation of fixed procedures for ascertaining these needs as adopted in the *Ascertainment Primer*[1] in 1970, resulted in the addition of questions on the renewal applications of commercial licensees. Our interest in the presentation of public service announcements caused questions on them to be added to the renewal applications. Our concern with the television programming to meet the needs of children and to assure that television licensees exercised restraint in the quantity of commercial matter

[1] *Ascertainment of Community Problems*, 27 F.C.C. 2d 650 (1971).

presented in conjunction with children's programming was reflected in questions added to the television renewal application. And the Commission attempt to develop information concerning the presentation of nonentertainment television programming gave rise to the Annual Programming Report (FCC Form 303-A) for use in conjunction with the renewal application.

6. The Commission established firm processing criteria for review of some of these matters. Thus, licensees who presented or promised to present nonentertainment programming falling below specific percentages set out in § 0.281 of our rules (see Appendix G) had their applications brought before the entire Commission for review. Those applications could not be routinely processed and granted under authority granted to the Chief of the Broadcast Bureau. Section 0.281 (see Appendix G) thresholds were established for the quantities of commercial matter presented, with specific thresholds for commercials presented in conjunction with children's programming. Guidelines were included to require Commission consideration of applicants whose presentation of nonentertainment programming varied sharply from what was proposed in the last renewal application, even if the amount presented was greater than the threshold percentages set out in Section 0.281.

7. This has led to the use of renewal applications requiring the filing of extensive documentation by licensees. Until the recent adoption of the *Radio Deregulation* decision (see para. 30, *infra*), even the Radio Renewal Form, FCC 303-R, printed on two sides of a page and containing 24 questions, became a substantial filing once all the exhibits called for by the application were attached. Our renewal form for commercial TV licensees, FCC Form 303, with its instructions is 21 pages long; the noncommercial renewal application, 15 pages.

8. A large staff was accumulated for review and assessment of these materials. Additional clerical and support staff were required to separate portions of the application; transmit those sections to various Branches within the Broadcast Bureau; and to tabulate some of that information. To the public, the industry, and the Commission this process evolved as the basis for this agency's compliance with our requirement to obtain the necessary information from licensees upon which to determine whether a grant of renewal of license was in the public interest.

9. In 1976, the Commission concluded the most recent in a series of reviews of the renewal application process. *Revision of FCC Form 303,* 33 RR 2d 1, *recon. denied,* 38 RR 2d 755 (1976). In that proceeding we eliminated several questions which yielded information of marginal utility and revised certain other questions to elicit only that information needed by the Commission to discharge its responsibilities. The direct outgrowth of that proceeding was adoption of a new and separate renewal application for commercial radio licensees, FCC Form 303-R. However, that proceeding gave no consideration to the nature of the renewal process, only to the efficacy of specific questions. Thus, the renewal applications adopted therein continued to elicit information on legal, technical, engineering, programming and equal employment opportunity performance of each licensee. The Commission did eliminate the required filing of balance sheets for commercial radio licensees, but not for commercial TV.

10. Even with the changes adopted in 1976, the renewal process remains costly and time consuming for both licensees and the Commission. Broadcasters must reduce their records to the form demanded by the application. Once the application reaches the Commission, it

must be checked in, routed to the various reviewing offices, reviewed and ultimately stored. Realizing the costs imposed on licensees by the treinnial filings and faced by competing demands for our own scarce resources, the Commission commenced a review of the renewal process itself, to ascertain what reductions in the burdens to both licensees and the government could be accomplished in a manner consistent with our regulatory obligations under the Communications Act. That review culminated in proposals to trim the renewal application process to its essential elements. The proposals adopted represented no change in substantive policies for service in the public interest.

11. What we proposed to change were the procedures by which we intend to monitor licensee compliance with our rules and policies. We observed that over the years most licensees have met or exceeded our operating guidelines and a renewal process which has consumed substantial Commission resources has resulted in few applications designated for hearing for failure to comply with our rules and policies. We therefore proposed that our processes be reduced to a level consistent with our obligations under the Act. We proposed to eliminate certain filing requirements which resulted in the submission of materials that were not reviewed by the Commission, and to adopt procedures which would assure that licensees continued to carry out their duties to serve the public interest consistent with our rules.

Proposals.

12. As set out in the *Notice*, we proposed new proceses that would require less direct review by the Commission's staff yet insure licensee compliance with our substantive requirements. Those processes would include implementa-

tion of a simplified renewal application in conjunction with audits and field inspections of randomly selected licensees to assure their compliance with our rules. The questions contained on the SRA would provide the Commission with adequate information to make its public interest finding consistent with the Communications Act. It would insure that all licensees comply with the Act's alien ownership requirements, have filed necessary equal employment opportunity and ownership information with the Commission, and are maintaining the additional data required by our rules in their public inspection files.

13. In addition, we proposed that 5 percent of all affected licensees be audited by filing a more detailed long form. Our selection was to be drawn randomly so that no licensee would know if it would be audited. Since the SRA questions are integrated into the audit form, licensees which received an audit form would not receive the SRA. The audit forms proposed are similar to the current renewal applications used by the Commission. However, a number of questions of marginal utility on existing forms were proposed for elimination. The audit form requires a licensee to demonstrate how it has ascertained community needs and interest, the programming service it has provided, including the amounts of nonentertainment programming, commercial matter, PSA's, and for television licensees information concerning its programming to the child audience. Finally, it requires the licensee to make promises concerning its operation in the future in these areas. These promises are to remain in effect until the Commission is notified of a proposed change.

14. We also proposed that a sample of 16 percent of all licensees be selected at random for visits by personnel from our Field Operations Bureau to determine whether

those licensees are in compliance with our technical requirements and to review the contents of the public inspection file for completeness. This measure was proposed to assure that licensees develop a record by which we can review compliance with substantive Commission requirements and that this material remains available to members of the public. The public inspection file will contain promises concerning the levels of nonentertainment programming to be offered in the future, the amount of commercial time that will be aired, and documentation of a licensee's compliance with our ascertainment requirements and equal employment opportunity policies. All of this and other material currently forming the basis for review of a licensee's past and proposed operations would remain available for public and Commission scrutiny. In this fashion, the integrity of our petition to deny process is preserved and adequate data made available to members of the public wishing to verify their concerns regarding a licensee's service to the public. Finally, we proposed that our Broadcast Bureau staff would conduct on-site inspections of some licensees submitting problem SRA's and audit form applications. If few such Broadcast Bureau inspections are necessary we proposed to select at random an indefinite number of licensees for on-site inspections to check the data filed in their renewal applications and other forms for reliability.

15. Additionally, the *Notice* merged into this proceeding a proposal to simplify licensee public notice obligations. This proposal was filed by the National Radio Broadcasters Association, which contends that the process by which licensees apprise the public of a licensee's obligation to the public is too cumbersome and complicated. It therefore proposed simplified announcements and timing for the presentation of these announcements. A detailed

review of these matters and of the comments submitted in this proceeding follows. The *Notice* also proposed significant other reductions in the burdens associated with the renewal applications filed by all licensees. We suggested that commercial television licensees be relieved of the burden of submitting balance sheets at renewal time and of some of the obligations associated with the Annual Programming Report, FCC Form 303-A. Licensees would submit their EEO Model Programs to the Commission only if our review of their employment profiles and other pertinent data revealed a need for us to delve further into this area. Other proposals were made and are discussed below.

The Simplified Renewal Application.

16. Having discussed, in general, the proposals before us, we turn our attention to the specific elements of the proceeding. The Commission proposed to adopt a simplified renewal application (SRA) which would elicit basic information concerning each licensee from which we would determine whether there were any impediments to a grant of renewal. The sample SRA attached to the *Notice* (Appendix A., therein), contained five questions.

—*Question 1* identifies the licensee and its location.

—*Question 2(a)* asks whether the licensee has complied with its obligation to file its Annual Employment Reports (FCC Form 395). This question assures that our Equal Employment Opportunity Branch has the information needed to review all licensees' compliance with our nondiscrimination and affirmative action requirements. With this information in hand, that Branch can act to defer an application for renewal of license if an adequate concern rergarding a licensee's compliance is raised by those annual filings.

—*Question 2(b)* verifies that a current ownership report is on file at the Commission for every licensee.

—*Question 3,* demonstrated that a licensee remains in compliance with Section 310 of the Act relating to interests of aliens and foreign governments in broadcasts licenses. The Commission currently gathers information concerning the citizenship of those who hold interests in a licensee through the ownership reports they must file with the Commission (FCC Forms 323 and 323-E). These forms would adequately apprise the Commission of compliance with Section 310 of the Act for most licensees. However, licensee corporations having more than 50 stockholders submit information only for stockholders who are officers and directors or who hold more than one percent of the stock of the corporation. The same is true for a party that has more than a one percent ownership interest in a noncommercial licensee and is not an officer or member of the licensee's governing board. The Act permits some alien ownership of shares of a broadcast facility. However, it is possible that one of a number of those holding such interests could place a licensee out of compliance with Section 310 of the Act by aggregation of these small interests. That fact would not be disclosed by the licensee's ownership reports. In the *Notice,* we stated our view that the burden of assuring compliance with Section 310 should be placed upon the licensee.

—*Question 4* confirms the applicant's continued good character, asking whether since the filing of the applicant's last renewal application an adverse finding was made, a consent decree entered, or a final action approved by a court or administrative body concerning particular conduct bearing on a licensee's character. These include actions concerning felonies, lotteries, unlawful restraints or

monopolies, unlawful combinations, contracts or agreements in restraint of trade or the use of unfair methods of competition. An affirmative answer to this question would require a full description of that matter and would result in scrutiny of that information at the Commission.

—*Question 5* protects the integrity of the petition to deny process and the Commission's own ability to review for each licensee the full range of its compliance with our rules. That question asks whether the applicant has placed in its public inspection file at the appropriate times the documentation required by §§ 73.3526 and 73.3527 of the Commission's rules. Those sections require licensees to retain and place in their public inspection files recent applications and associated exhibits filed with the Commission. Under those sections, other significant information must also be kept on file and made available to the public including: *The Public and Broadcasting—A Procedure Manual,* which sets out licensee obligations to the public and the avenues available to the public for consideration of complaints; Annual Employment Reports (FCCC Form 395) for the last seven years; the licensee's Equal Employment Opportunity Model Program; composite week logs for verification of a licensee's programming performance; and a full range of ascertainment documentation.

COMMENTS[2]

17. The proposed adoption of the simplified renewal application generated a wide range of comments. Action

[2]Where comment on a particular matter was light, the comments may be integrated into the discussion of our resolution of that matter. We have not set out every particular suggestion or comment, but all comments have been considered. Finally, some minor or technical suggestions which were unopposed are reflected in form or rule changes without discussion in this *Report and Order.*

for Children's Television (ACT), the Office of Communication—United Church of Christ (UCC), Citizens Communication Center (CCC), National Citizens Committee for Broadcasting and Public Media Center (NCCB-PMC) argued that the questions on the SRA do not provide an adequate basis from which the Commission can reach the statutory finding that a grant of renewal serves the "public interest, convenience and necessity." 47 U.S.C. 307(d) and 309. In this vein NCCB-PMC argued that "at the heart of this rule making is a switch from a renewal form capable of measuring licensee performance and capabilities to one whose only concern is whether a licensee is a law violator * * *." Citing *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969), NCCB-PMC argued that by adoption of the proposed SRA the Commission would be abdicating its responsibility to develop a meaningful record on which to renew a license. CCC echoes this view and adds that "the Commission itself has stated that renewal application must normally provide the Commission with sufficient information to make its public interest determination. *Renewal of Broadcast License*, 44 F.C.C. 2d 403, 406 (1973)." These comments posit that the Commission cannot renew a broadcast license without a detailed review of each licensee's performance.

18. UCC and others add that adoption of the SRA would result in grants of licenses beyond the three years permitted under the Act. This view is based upon the contention that the Commission would be discharging its statutory obligations only in connection with licensees who complete the audit form application. Thus, the actual license term would be between the times that a licensee completed the proposed audit forms. Since the statute provides only for 3-year license terms this course of action would be prohibited.

19. National Black Media Coalition (NBMC) and NCCB-PMC raise concerns regarding the statement in our *Notice* that, "* * * we have found that the best vehicle for bringing violations to our attention has been public participation in our processes through petitions to deny, informal objections, and complaints." From this language, they conclude that the Commission has shifted primary regulatory responsibility for broadcasting to the public and citizen's group. NCCB-PMC argued that we should consider the fairness to licensees of having their renewals depend heavily on the existence or absence of concerned citizens in their communities. NBMC maintains that:

> The *entire* annual budgets of all the media reform organizations, local and national, in the country would not purchase a single sixty second commercial on the Superbowl. It is fundamental that costs should be borne by those capable of bearing them. No licensee has suffered by bearing these costs thus far.

NBMC also contends that the SRA will deprive citizens groups of easy access to licensee records, and that requiring citizens to inspect station files locally to obtain information will have a chilling effect on public participation. In this regard, it states:

> Even more serious is the problem faced by those, including but not limited to, many of our affiliates who desire to read licensee files without either the licensee's awareness that they are being read, or the licensee's awareness of which specific documents are being perused. A station employee with a grievance, a union, a political candidate, and a potential future job applicant are only some of the many types of people with an interest in what might be in a public file and a legitimate fear of reading

the file itself. Often, these individuals rely on those of us in Washington to go to the FCC and find the relevant information for them. More often they do without.

The Committee for Community Access (CCA) suggests that if the SRA is adopted renewal information be sent to the Commission but not looked at by Commission staffers unless it is necessary to do so. NCCB-PMC urges us to require licensees to ship documentation to Washington at the licensee's expense on request by a member of the public.

20. ABC, General Electric Broadcasting Co. (GEBCO), WNET and Joint Comments (see Appendix A), disagree with these comments concerning our authority. They argue that the Commission has very substantial discretion to reconsider, and review, from time to time, the appropriateness of regulations affecting broadcasting, including the continued need for particular information in connection with renewal applications. The NAB supports this view citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). These commenters go on to say that many of the Commission's regulatory "tools," such as ascertainment, minimum programming percentages, commercial standards and program log requirements were not derived from specific statutory requirements, and that the Commission carried out its mission for many years with either no requirements in this area or with different less burdensome ones. Thus, these licensees comment that contrary to the assertions of these opposing parties, it is fully within the power of the Commission to revise and eliminate regulations when, in light of accumulated experience, it finds them burdensome and of little or no value in making the public interest judgments called for by the Act.

21. Support for our SRA proposal was received from the law firm of Smith & Pepper and from KEZY Radio, Inc. A number of comments from noncommercial broadcasters and their associations also supported these proposals. Illinois Eastern Community College believes that, "coupled with the proposed random audit and field inspections, the new renewal application process will adequately assure compliance with Commission rules and the Communications Act while, at the same time, providing the Commission, public and industry substantial savings in costs, effort and paperwork * * *." These sentiments were supported in reply comments filed by the National Federation of Community Broadcasters and the West Virginia Board of Regents. National Public Radio (NPR) "heartily" endorsed our proposal indicating that an NPR informal survey of a small number of its member stations revealed that an average of 48 hours of station staff time is required for preparation of the current renewal application, time which it contends could be better directed to programming.

22. The *Notice* asked whether any other questions should be added to the SRA. Aside from comments which argued that all of the questions currently asked should be put back, the United States Catholic Conference and ACT urged that we include a programming question on the SRA. The West Virginia Board of Regents urged that we include a question which would ask whether the licensee has complied with all Commission rules.

Discussion

23. The Commission's mandate to regulate the broadcast industry was broadly conceived to afford this Commission the flexibility it would need to meet new technology and changes in the public's needs. See

Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966). Indeed, the courts have determined that the language of Section 308(b) of the Act setting forth areas such as citizenship, character, financial, and technical qualifications, upon which the Commission shall make its public interest determination, merely provides examples of the types of areas concerning which the Commission may require licensees to submit information. *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) *(NARUC)*. Concerning Section 308(b), in *NARUC* the Court held:

> That section leaves it within the discretion of the Commission to decide which facts relating to such factors it wishes to have set forth in applications. Since this leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate, if follows necessarily that the Commission is not required to consider financial fitness if it deems it irrelevant to its regulatory scheme. *ID.* at 645.

The Commission therefore has substantial discretion to reconsider and review the appropriateness of our regulations including the continued need for particular information in connection with renewal applications.

24. Historically, the Commission has used the renewal process to enforce its rules and policies. For example, our review of renewal applications has allowed the Commission to ferret out applicants who transgress processing guidelines for too many commercials, not enough nonentertainment programming, problems-programs lists that do not correlate, or licensees who have fallen significantly short of prior programming promises. Those who cross the established thresholds have their applications referred to the full Commission for review. Those

who do not transgress those processing criteria are ordinarily granted renewal pursuant to delegated authority.

25. In essence the Commission grants applications that meet its processing criteria unless specific concerns are brought to its attention which lead it to conclude that the public interest would not be served thereby. In such cases, we have an obligation to create a full and complete record concerning pertinent conduct on the part of the licensee being considered. The thrust of the *United Church of Christ* case, cited above, supports this view. In that case complaints were made to the Commission alleging that a licensee had engaged in discriminatory conduct. An adequate showing had been made raising a question of whether a grant of renewal would be in the public interest. Under such circumstances the "Commission and the Examiners have an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest." 425 F.2d at 548.

26. Under the rules and policies adopted herein, the information necessary to conduct an in-depth review of a licensee's performance will be available at the station in the public inspection file. Interested citizens need only visit that file to avail themselves of the information necessary to support a complaint or petition to deny, should one be appropriate. We have weighed the concerns over confidentiality and to not believe them insurmountable. These concerns do not justify the added burdens on licensees and the Commission of requiring the filing of public file materials in Washington. Regarding the unavailability of data here in Washington, the purpose of broadcast regulation is to assure licensee operation in the public interest. Our concerns for assuring the ability of local citizens to monitor

the operations of licensees who serve them are fulfilled by maintenance of local public files. Indeed, local record keeping should serve the ends of promoting dialogue between a licensee and interested members of its community. Therefore, we will not require the submission of such information to us in a blanket fashion.

27. We believe that our regulations and policies have guided the industry in the provision of adequate levels of nonentertainment programming. As stated in our *Notice*, our experience has shown that most licensees meet or exceed our processing guidelines. This is an important consideration in balancing Commission priorities. The Commission currently devotes enormous energies and space to the renewal process during a time when we carry a significant backlog of applications for new facilities and major changes. Currently awaiting resolution are approximately 250 petitions for rule making to assign new FM or television frequencies to particular communities; 850 applications for new AM, FM or television facilities; 650 applications for major changes in AM, FM or television licenses; 2,500 applications for low power television authorizations; 800 applications for new translator authorizations; and 100 applications for major changes in translator authorizations. The Commission is faced with budget reductions and it is, therefore, incumbent upon us to pursue the most efficient uses of our staff. Often this requires that we balance needs, emphasizing those which are most important. We believe that adoption of the SRA will free up scarce resources for use in other areas.

28. Our ability to make our public interest finding is preserved through the SRA. Our § 0.281 criteria are unaffected by the actions taken in this proceeding (see Appendix G). Nor have we altered the requirements for ascertainment or the presentation of programming to meet

community needs and interests. Programming performance in the public interest can be monitored in this fashion as readily as other Commission requirements. We will retain an investigative staff ready and able to inquire into serious violations. FOB will continue to report on serious technical violations. The Renewal Branch will continue to review petitions to deny and informal objections. No change in the current petition to deny process embodied in Section 309 of the Act was proposed and we make no such change herein. Any facts adduced through this process which adequately raise questions of whether a renewal of license would be in the public interest will serve to defer renewal pending full consideration of those facts. These tools will act as a complement to the audit and inspection processes as they do to our current methodology. For licensees which are not audited or inspected we will assume continued compliance with our rules as we have done for so many rules that have never been part of the renewal application process. The audit and inspection process will reveal whether the premises upon which we act are ill-founded.[3]

29. Unlike radio deregulation, this proceeding was never intended to change our current substantive requirements for the broadcast industry, and it does not alter the substance of licensee obligations to serve the public interest. Rather, we are modifying the procedures for review of compliance with the Communications Act as well as our regulations and policies. In this regard, the

[3]A number of commenters have urged that a change this significant should first be implemented on an experimental basis. We are confident that our methodology will work and do not believe that an experiment is needed. Should our confidence prove to be misguided we will certainly be in a position to institute a proceeding to consider this matter and to fashion adequate remedies.

SRA provides us with adequate information to make a determination that a licensee is not in violation of statutory requirements, has filed certain required reports with the Commission and has provided for the local public availability of certain required information. In the absence of any indications to the contrary, the information supplied by the SRA is thereby sufficient to make the statutory finding that grant of the subject renewal application would serve the public interest. However, the presumption of service in the public interest may be rebutted by SRA responses which indicate violations of statutory requirements, or Commission regulations. It would also be rebutted by substantial complaints or petitions to deny alleging violations of statute, the Commission's rules or policies.[4] Moreover, in order to insure the continued viability of this presumption, we will institute random long form audits of television and noncommercial radio licensees. The audit procedure will provide independent assurances of the conclusions which support the presumption.[5]

30. In this respect, we note that in the recently concluded radio deregulation proceeding[6] we determined that significant changes in the radio marketplace had occurred over the past 45 years so that detailed regulation of nonentertainment programming, ascertainment, commercial limits and logging practices were no longer required by this Commission. Therefore, for radio we eliminated the

[4]Situations in which the SRA, complaints or petitions to deny, indicate a problem in the operation of a broadcast station will be resolved in the same manner as under present procedures.

[5]Field inspections by the Field Operations Bureau, complaint procedures and the petition to deny process will provide additional assurances of the validity of the process.

[6]*Deregulation of Radio*, 46 FR 13888, published February 24, 1981.

programming percentage guidelines, ascertainment requirements, commercial guidelines and program logging requirements maintaining a generalized obligation for stations to offer programming responsive to issues facing their communities. All renewal application questions relating to these areas were either eliminated or changed to reflect these changes in policy.[7] Since we have eliminated the guidelines in these areas, a long form audit would serve no purpose. Indeed, we have essentially adopted an SRA for these licensees in our deregulation proceeding. Any shift to meaningful audit procedures for radio, therefore, would require us to undo the philosophy and impact of that proceeding. We will therefore, with some modifications discussed below, adopt the simplified renewal application for commercial radio as its sole application and consider our proposed random long form audit procedure only for television and noncommercial licensee.[8] We will, however, conduct random FOB technical inspections and check the public inspection files of commercial radio licensees for completeness. Should our determination concerning radio deregulation be reversed on appeal, we will implement the long form audit discussed herein and in the *Notice* for commercial radio licensees.

[7]Question 13 of the current commercial radio renewal form was modified to ask "Has the applicant placed in its public inspection file at the appropriate times its annual list of issues which, in the applicant's judgment, warranted treatment by the station and typical and illustrative programming in response thereto?" SRA Question No. 5 would verify compliance with this requirement. (Appendix C.) Appendix J of the decision in the deregulation proceeding contains the changes made in FCC Form 303R. Those changes are effective for all commercial radio renewal groups filing on or after April 3, 1981.

[8]The *Notice* explained that we may have to conform this proceeding to any decisions made in our Children's Programming proceeding. See *Notice of Proposed Rule Making*. Docket No. 19142,75 F.C.C. 2d 138 (1979). No action has been taken in that proceeding since adoption of the *Notice in this proceeding*.

The Long Form Audit

31. The *Notice* proposed three measures that would act as the enforcement tools in the suggested renewal procedure. Among them we proposed to randomly select 5 percent of all licensees and to send them an audit form instead of the SRA. The audit forms are similar to the renewal applications currently in use, and, when completed, will supply the Commission with all of the legal and programming information supplied in current renewal applications. To develop this information and for our enforcement purposes it was proposed that licensees would be required to retain in their public inspection files much of the same documentation as is required for completion of the existing applications. As noted above, no audit forms are being adopted for commercial radio licensees. The form adopted for commercial television licensees is found in Appendix D, the form for noncommercial licensees, in Appendix E.

Comments

32. Citizens groups and members of the public who disagreed with the proposed renewal process directed their concerns mainly to the inadequacy of the SRA as a basis for concluding that renewal of a particular license was in the public interest, or submitted the unsupported view that the proposed audit percentages are insufficient. Industry groups disagreeing with these proposals, including ABV, GEBCO, WNET and Joint Comments, attacked the Commission's premise that this process entailed any savings to the industry since it will have to compile all data currently prepared for completion of existing renewal applications. Very little comment was directed solely to the proposed audit forms. However, many licensees objected to what they perceived as mistrust on the part of the Commission.

Thus, CBS took issue with the "hard look" we suggested for audited licensees. It believes that implicit in such a statement is the notion that many serious rule violations are not detected by either the Commission or the public and will be found by more effective searching.

33. A number of those commenting expressed opinions concerning the methods to be used for random selection should be proposals in the *Notice* be adopted. Comments on this topic were provided by parties favoring and opposing the proposed renewal procedures. NBC, Smith & Pepper and Cox Broadcasting Corp. (Cox) urged that the Commission employ a truly random sample. Smith and Pepper suggested that a computer programmed to generate numbers randomly might be used. Cox maintains that weighting the sample in favor of minorities, a proposal for which we requested comment, is unnecessary to achieve review of licensee compliance with our rules. It notes that in markets with statistically significant minority populations, station performance is already monitored by those minorities. Storer urges that the past ten years' history of citizen participation in the renewal process underscores the validity of this position. NBMC differs with this view and urges that samples be weighted to assure review in communities with significant Black American populations. Absent such weighting, NBMC is concerned that licensees will not have adequate incentive to program to this element of the community. Similarly, it urges that licensees found to have fallen short in the past be plugged in for a second audit. CCA recommends that the Commission separately draw complete random samples of radio and television licensees with no other weighting required. The Ohio Association of Broadcasters urges that audited licensees be assured that they will not be selected repeatedly.

Discussion

34. We have considered the comments of those who argue that audits of 5 percent of the industry are inadequate for enforcement purposes. We believe that a minimum of 5 percent would be adequate for enforcement purposes. Each station stands at least a 5 percent chance of being audited. The possibility of further Commission scrutiny is sufficient inducement to comply with our rules. Moreover, as indicated, this is the minimum number of audits we will do and flexibility is preserved to increase the number of audits we will do should it be demonstrated that an increase is warranted. Indeed, we may vary this percentage from license period to license period. We will never do less than 5 percent.

35. We have considered comments concerning weighting the random samples. We will draw our samples based on renewal filing periods. These samples will be drawn using a computer or manual random number generator. No personal choice will be exercised in the random selection process. A bi-monthly sample will be made of commercial television and noncommercial licensees from among the states that file together.[9] Drawing a sample for every renewal filing date will assure that samples are drawn widely across the country. This procedure will assure that all of these licensees, wherever located, stand at least a 5 percent probability of an audit. This is sufficient inducement to comply with Commission

[9] A separate sample of commercial radio licensees will be drawn for the Field Operations Bureau's on-site inspection of the public file.

requirements. We believe that weighting for minority concentration is not necessary as all of these licensees will be equally prone to audit or inspection and there is no reason to assume that a licensee serving an area densely populated by minorities would be any less responsive to their needs than would a licensee located in an area with a sparse minority density. Similarly, since the thrust of our audits and inspections is enforcement, this goal is better served by drawing from pools of all television and noncommercial licensees each time the selection is made. It is conceivable that a licensee might escape selection time after time, but it is equally likely that a licensee will be selected time after time. It is the latter concern that we wish to highlight. Similarly, since we will draw separate samples for the audit forms and FOB inspections, a licensee may receive one, none or both of these inquiries.[10]

36. In its discussion of the audit forms, the *Notice* proposed not to continue the Commission's practice of requiring TV licensees to furnish balance sheets and to explain how they dispose of complaints from the public. Concerning the former, the *Notice* explained that the balance sheets are no longer reviewed by our processing staff. We no longer perceive any need for this information. No opposition to the proposal was received and the requirement that these balance sheets be filed is therefore eliminated. Concerning the latter, we expressed the view that no meaningful response other than self-serving statements could be made in response to this question. NCCB-PMC argued

[10]Virtually all of the information now available in renewal applications will be retained by licensees. Should we desire information for use in connection with policy considerations, we can request that information from all or some licensees. This strikes us as being more reasonable than routinely requiring the filing of information we may never use.

that requiring the licensee to respond to this question will make licensees develop such methodology; that the answer will point out blatant unresponsive licensees; and that the public will identify blatant discrepancies between what licensees state in response to this question and the truth. We do not believe that this question is necessary to assure a dialogue between the licensee and the public. It is clearly in the licensee's own interest to maintain good relations with all sectors of its community. To the extent that a licensee might resist these reasons for maintaining good relations with members of its community, it is not likely that this question on the renewal form could effectively change that attitude. In other respects we find this question unusable for data or enforcement purposes. Therefore, this question is not included in the audit form.

The FOB Field Audit and Engineering Information

37. The Commission's Field Operations Bureau currently has local and regional offices around the country. Among its other functions, FOB monitors licensee compliance with our technical requirements. At the time our *Notice* was adopted, FOB monitoring of broadcast facilities was devoted largely to checks of the directional arrays of AM licensees. Approximately 500 such inspections were conducted annually. Recently, upon conclusion of its monitoring of AM directional arrays, FOB instituted a random selection process for review of the technical operations of all commercial and noncommercial licensees.

38. In the *Notice*, we stated that applicants for initial licensing for a commercial or noncommercial AM, FM or television facility or for modifications of existing facilities must submit substantial detailed engineering data to the

Commission. See FCC Forms 340 and 341 (noncommercial facilities); and 301 and 302 (commercial facilities). We expect licensees to maintain their technical facilities and operations at the levels required by our rules and the licensees' authoritizations. In this regard, we have stated:

> One of the most essential duties incumbent upon the licensee of a broadcast station is that of insuring the continuous operation of the transmitting equipment. In fact, this is an indispensable condition of the good service of any station. Failure of this equipment, due to causes reasonably within human control, whereby the public is deprived of service, denotes a state of carelessness and mismanagement which this Commission, in the exercise of its regulatory authority, will not condone.

Brooklyn Broadcasting Corp., 4. F.C.C. 521, 531 (1937), cited in *The Heart of the Black Hills Stations*, 32 F.C.C. 2d 196, 199 (1971), *recon. denied*, 25 R.R. 2d 10, *aff'd per curiam*, (D.C. Cir. 1973), *cert denied*, 414 U.S. 1002. The Commission has denied renewal of license for continuous and repeated failure to comply with the technical requirements of our rules and the licensee's authorizations. *The Heart of the Black Hills Stations, supra; United Television Co., Inc.*, 55 F.C.C. 2d 416 (1975), *recon. denied*, 37 R.R. 2d 503 (1976); *Charles C. Carlson [WJBW)*, 12 F,C,C, 892 (1948), aff'd per curiam, 172 F.2d 766 (D.C. Cir.), *cert. den.*, 337 U.S. 930 (1949).

39. There was no opposition to the proposal to eliminate the engineering component of our renewal applications and substitute FOB monitoring. We continue to believe that checks for compliance with these rules are suited to random field inspections as will be undertaken by FOB and that violations in this area are particularly suited

to assessments of forfeitures until a compliance is at tained.[11] Moreover, serious infractions of our technical rules are likely to be brought to our attention by the public or other affected licensees. This proposal will, therefore, be adopted. FOB has developed a random methodology for engineering review of licensees and has already implemented this procedure. Through this methodology it is currently inspecting the technical operations of a random selection of all licensees. Therefore, elimination of the engineering portion of all renewal applications can be implemented at the earliest permissible time.

40. We proposed that FOB personnel undertake, in addition to their technical duties, to review the public inspection files of approximately sixteen-percent of all licensees. No specific comment pertaining only to this aspect of our proposal was made. Related comments are covered elsewhere in this *Report and Order.*

4.1 We conclude that these FOB inspections provide an effective means to assure that licensees retain the documentation that we require. We have prepared a checklist of particular public file documents (Appendix F) that FOB personnel will check for. While the list does not include every document for which we require retention, it does list those documents integral to the public and the Commission for most of their needs.

42. Recent cutbacks in our budget have eliminated a number of planned new FOB field offices and a number of

---

[11]We requested comment on use of alternate sanctions for noncompliance with our rules. No comments favoring such an approach were submitted. Many comments argued that we are without statutory authority to impose sanctions other than those provided by Section 503 of the Act. We do not reach the issue of authority to impose alternate sanctions, and have concluded that the monetary forfeitures currently allowed are adequate.

existing field offices will be closed. Given this fact, we are reducing the number of planned field inspections to 10%. Further reductions may be necesary. If budget constraints require further reductions, we will continue to do a sufficient number of these audits to assure their utility as an enforcement tool. We believe that a review of the technical operations of a random selection of all licensees is adequate to assure licensee compliance. Moreover, as noted above, the FBO inspections of the public files will assure that information necessary for further review by the Commission and the public is available. All commercial television and noncommercial licensees will continue to place ascertainment documentation and composite week logs in their public inspection files. Radio licensees will file their issues-programs list as well as other pertinent information.

The Broadcast Bureau Onsite Inspections

43. The final element of our proposed procedure is the Broadcast Bureau audit. We suggested that Broadcast Bureau personnel could be used to conduct on-site investigations of licensees submitting problem SRA's and audit forms. In addition, we proposed that if few such investigations were needed, we could select licensees at random for on-site inspections by the Broadcast Bureau personnel to check the data filed in license renewal applications and other forms for reliability.

44. The Broadcast Bureau's proposed field audits raised considerable concern. Many of those who might have otherwise supported use of the short form renewal application found the Broadcast Bureau audit to be too great a price to pay. As stated by the Maryland-D.C.-Delaware Broadcasters Association (MDCD), while some relief in the form could be helpful ". . .MDCD is extremely con-

cerned about the catch to the SRA – the random field audit." It contends that now a licensee can have counsel active in the prosecution of a renewal application. It believes that it will not be practical to have counsel present for field audits, thereby abridging broadcasters' rights.

45. Weighing the benefits against the detriments, National Radio Broadcasters Association (NRBA) concluded that the industry would be trading decreased filing requirements for increased exposure to potential Commission sanctions for violations that might be discovered during field audits. NRBA and Ohio Association of Broadcasters interpreted the Broadcast Bureau's audit as all inclusive – exposing all facets of a licensee's operation to Commision scrutiny. ABC felt that the Broadcast Bureau field audit may well represent a "fishing expedition." CBS comments that such searches would have a chilling effect upon the exercise of licensee First Amendment rights Cox, which generally supports the Commission's proposal, concludes that the suggested Broadcast Bureau on-site inspection implies that the Commission has an unsubstantiated suspicion that licensees are not trustworthy.

46. Our proposal to check applications for reliability were perceived by many broadcasters to resemble illegal searches and seizures or random frolics through licensee operations. We did not intend such on-site visits to be in the nature of investigations. We did not propose to conduct interviews with staff members or to conduct a "fishing expedition" to elicit undisclosed violations. What we did intend was to verify the information supplied on SRA's or audit forms through use of information ordinarily generated for that purpose. Licensee public files will contain information which will permit us to review past programming and commercialization, promises and performance in those areas, completeness of the materials in

the public file, ascertainment compliance, and programming to children, to name some of those areas. We consider the potential for this review as an important element of this proposed enforcement technique. We have not proposed to do any particular number of these inspections and will be free to structure these in a manner consistent with our perception of their need and our budgetary constraints. We will continue to "investigate" serious, adequately documented allegations of licensee misconduct. These will continue as the traditional investigation currently conducted by our Complaints and Compliance staff. These investigations would involve concerns such as misrepresentation or unauthorized transfers of control. However, under the new process adopted herein, we may also conduct on site "inspections" at stations that submit problem SRTA's or audit forms that cannot be brought up to snuff through correspondence or telephone inquiries from our staff. Depending upon budgetary constraints, we may also conduct on site "inspections" of a number of stations selected at random to verify the accuracy of information submitted to us. This latter "inspection" will involve a review of only the types of information routinely reviewed by the Commission, such a program logs and public file materials. it will not include such investigative conduct as interviews with station employees or reviews of confidential financial information. As with the long form audit procedure, any on-site random audits will include only commercial television licensees and noncommercial television adn radio licensees.

Equal Employment Opportunity

47. The *Notice* proposed that an updated EEO program would be deposited annually in the station's public file, and that the Commission would develop a method that, by

review of Form 395 filings for conformance with our EEO percentage guidelines or such other factors as previous conditional renewals, would identify those renewal applicants whose EEO programs need in-depth reviews. These licensees would be informed, prior to the due date for their renewal applicaitons, that their most recent annual EEO programs should be filed before we will consider a grant of their renewal applications. Unless called for, Model Programs would not be routinely filed with the Commission. Upon reflection, we conclude that all of these decisions are more appropriately made in the overall context of our pending EEO proceedings, Docket No. 21474. We are not, therefore, adopting our proposed deletion of this filing requirement. All licensees will continue to submit their model Programs on the date that their renewal applications are due to be filed with the Commission. One final matter concerning EEO must be resolved. While we did not propose any methodology for licensees to continue to apprise us of complaints filed against them, we believe that this information should still be filed. Therefore, pending the final resolution of Docket 21474, we require licensees to submit this information as a part of Element 10 of their Model Programs.

Ownership Reports

48. The Commission currently requires licensees with 50 or more stockholders to file a new ownership report every year. All other licensees submit a new ownership report every three years. Section 73.3615 permits a licensee to incorporate by reference an ownership report that was filed within three years of the application being submitted. We proposed to relieve licensees with current and unamended ownership reports on file at the Commission of the obligation to refile. We believe that approximately

one-third of our licensees would benefit from this relaxation of our rules. Virtually all licensees benefitted by this proposal would be in the group of licensees with less than 50 stockholders. There were no comments opposing this proposal. Some licensees, such as Cox argued that current and amended reports should be sufficient to relieve licensees of this filing requirement. We would prefer to follow the course suggested by Cox. However, accurate ownership information is essential to our regulatory process. We have found that amendments have generated significant changes to the initial ownership reports on file. When it is necessary for us to reconstruct a licensee's ownership from these amendments we have the ability to do so. Nevertheless, on a current basis this reconstruction requires an inordinate amount of time and we are benefitted by completely updated ownership forms. We hope, in the future, to place this information into our computers in a manner which would allow us to accurately update our files through amendments. Until that time we will relieve only those licensees with current and unamended ownership reports from this filing requirement.

Annual Programming Reports—Form 303-A

49. The Commission requires that all commercial television licensees file Annual Programming Reports—Form 303—A. The reports provide the Commission with nonentertainment and local programming data for a composite week drawn over a year. We proposed to merge this form into our television audit form or to require that it be placed in the public file. In either event we proposed to discontinue the requirement that all licensees annually file this form with the Commission.

50. Action for Children's Television, providing the only significant comment on this proposal, opposed it

strenuously. It contends that this form provides important information concerning licensee performance and broadcast trends. Indeed, ACT contends that even more reporting is required if broadcasters are to recognize their obligation to the child audience.

51. The Commission adopted Form 303—A in 1973, citing a number of benefits it would provide. *Renewal of Broadcast Licenses,* 43 F.C.C. 2d 1. The form was to provide the Commission with yearly statistics regarding nationwide television programming on commercial stations during a given composite week. These statistics were expected to be valuable to the Commission in shaping any new policies in this area and in making the Commission, Congress and any interested parties better informed. The form was also to permit the Commission to make a more complete evaluation of the programming performance of the licensee during the past renewal period. The Commission also anticipated that information compiled through Form 303—A could be valuable in a comparative proceeding. Finally, the Commission expected that it could set up a ranking of licensees by their performance and the staff could closely scrutinize the renewal applications of licensees whose ranking falls below a specified level and prepare a summary report of those applicants. We concluded that for statistical purposes we could not acquire an adequate data base over a three-year period. Three annual composite weeks were, therefore, used.

52. Our review discloses that use of the information on Form 303—A for policy formulation has been very limited. Only the Cable Bureau has used this information in connection with consideration of policy matters regarding specialty channels and for economic impact studies. Indeed, when our staff attempted to use this information for policy formation in the Children's Television pro-

ceeding we found it impossible to use for that purpose. Therefore, to the extend that we perceive a need for annual filing and composite weeks for the purposes of a statistically sound data base, that data base has been rarely used and its utility is questionable. Our rating scheme was not adopted with the annual report and has not been resurrected.

53. Additionally, there is the concern over the costs associated with processing 303—A data when such data are infrequently utilized by the Commission staff. Licensees submit to the Commission two copies of the 303-A form plus accompanying program descriptions pertaining to news, public affairs and other nonentertainment/none-sports programming. The amount of time devoted to various program categories and other licensee information, are prepared for computer analyses as a preliminary step in compiling the data on the Annual Programming Reports. Subsequent computer analyses, printing, mailings, staff resources and miscellaneous expenses, *e.g.*, telephone inquiries, are all calculated as Commission expense items. The dollar costs for processing these data are substantial. Commission estimates place the dollar cost of processing 303—A data for each filing at approximately $160 to $250 per license renewal period. Since the inception of the 303—A form (1973), the total cost to the Commission of analyzing the data is estimated to be between $300,000 and $500,000. We believe that a triennial composite week reflected in a form made part of our audit procedures will permit us to monitor the promise vs. performance compliance of our licensees at a reduction in cost to the Commission. All licensees will be bound to promises made in their latest renewal application or Audit Form unless the Commission is notified of a change in the proposal. Additional information for the renewal or com-

parative proceedings can be generated from the station programming logs as needed.[12] We do not believe that in other respects the burden on licensees in compiling this data and on the Commission in tabulating it is warranted. The 303—A form will therefore be merged into the television audit form and will tabulate data drawn over a triennial composite week.

Radio

54. In the *Radio-Deregulation* proceeding we modified our renewal form deleting numerous questions and modifying one. The remaining questions concerning ownership (FCC Form 303-R, question 4); alien ownership (question 5); violations of law (question 7); placement of the issues-programs list in the public file (question 13 as modified); and identification of the applicant we covered by the proposed SRA. We have concluded that no specific engineering or EEO information will be sought in renewal applications. EEO filing requirements will be verified on the SRA. Question 6 asks "Is the applicant or any officer, director, or principal stockholder (any person owning 25% or more of applicant's stock) an officer, director, or 25% or more stockholder in a newspaper publishing company, a CATV company, or a company engaged in broadcasting related activities?" This question has been used in the past for data collection but has seldom been used. Since our multiple ownership rules are adequate to assure that abuses in this area will not occur, this question will no

[12] In our *Notice*, we asked how competing applicants would be treated in light of our proposals. This process for competing applications for commercial radio licenses was disposed of in our radio deregulation proceeding. We have retained the requirement that TV licensees make promises concerning their nonentertainment programming. We will continue to process competing television applications consistent with current practices.

longer be required. Also, as a result of the U.S. Supreme Court's action in *FCC v. CNCN*, Case No. 79-824, issued March 24, 1981, we are also deleting the format question from the audit forms. Licensees filing renewal applications 30 days after this Order is printed in the **Federal Register** will not have to supply format information.[13]

55. The Commission's regulations adequately govern program duplication. 47 CFR § 73.242. Unless a waiver of this rule has been obtained licensees must comply. This question will, therefore, no longer be asked of commercial radio renewal applicants. Finally, question 22 asks licensees to "attach as Exhibit 22, any additional information whch, in the applicant's judgment, is necessary to adequately describe or to present fairly its services and operations in relating to the public interest." We are confident that radio licensees who feel compelled to submit additional information will do so, and therefore this question need not be included. Therefore with the other actions taken above, the SRA will serve as the complete renewal application for commercial radio licensees.

Licensee Public Notice Requirements

56. The National Radio Broadcasters Association (NRBA) filed a petition for rule making which has been merged into this docket. It asks that the Commission amend § 1.580(d) (now §§ 73.3580) and 73.1202 of its rules to:

a. Substitute a single "Regular Announcement" regarding the obligation of licensees to operate their stations in

[13]Similarly, effective 30 days from publication of this *Order* in the **Federal Register**, applicants filing FCC Forms 301, 314 and 315 are not required to answer questions on those applications concerning program format.

the public interrest for the two public announcements presently required by § 73.1202 (d) and (e) (currently subsection (c) and (d)).

b. Substitute a single "Renewal Announcement" for the separate "pre-filing" and "post-filing" renewal announcements presently required pursuant to § 1.580(d).

c. Establish unchanging "Schedules of Announcements" for radio and television which will be applicable to both "Renewal Announcements" and "Regular Announcements."

d. Indicate during what specified time periods the announcements required to be given pursuant to § 1.580(d) in connection with applications for modification, assignment or transfer of operating stations should be broadcast.

57. The announcements covered by § 73.1202 (c) and (d) are announcements by commercial licensees to inform the public of the licensee's obligation to the people and of the appropriate method for individuals to express their opinions of the station's operation. These are aired on the first and sixteenth day of each calendar month throughout the license period. The timing of these announcements is rotated to reach listeners with various listening habits. The language of this announcement is modified, under subparagraph (d) of the rule beginning with the first day of the last month of the license term and ending with that license term. Upon grant of renewal the modified announcement is abandoned and the regular announcement is made again.

58. Section 73.3580 provides two substitute announcements for the regular announcements. These are commonly referred to as pre- and post-filing announcements and

are also imposed upon noncommercial licensees. The pre-filing announcement alerts the licensee's audience to the fact that the licensee will soon file a renewal application. These begin on the 1st day of the 6th full calendar month prior to expiration of license and are made on the 1st and 16th day of the calendar month. At least two of the four such announcements must be made during hours when audience levels are expected to be their highest.

59. Beginning with the 1st day of the fourth full month prior to expiration of license (that is, beginning on the date that licensees must file their renewal applications), licensees must make the post-filing announcements. These alert the citizens to the fact that a licensee's application has been filed, and continue up to the last day on which a petition to deny can be filed (that is, the first day of the last calendar month prior to expiration of license). Three of these announcements are made on a rotating schedule and three during the hours of prime listenership.

60. This is a rather general rendition of these requirements. As was shown in the *Notice*, effectuating this process is unnecessarily complex. Therefore, NRBA asks that we implement one regular and one renewal announcement and a standardized schedule for all such announcement required in connection with applications for modification, assignment or transfer of an operating station. Section 73.3580 requires four such announcements once each of four days of a particular week. The time of day of the announcement is not specified. NRBA provides sample texts of the announcements it proposes. Concerning the timing, it would permit one-half of the announcements to be made during any time between 6 a.m. and midnight. The other half would be made during peak listening time as set out in the rules.

61. Oppositions to the NRBA proposal were submitted by National Citizens Committee for Broadcasting prior to issuance of our *Notice* and by CCC in response to our *Notice*. They contend that compliance with these rules is not as difficult as it is made out to be and that any change in the timing of these announcements will limit their reach and frustrate the purposes of this link between the licensee and the public CBS, on the other hand contends that these announcements are useless and should all be eliminated. ABC and NAB believe that these announcements can be justified only in connection with the time that citizens have formal vehicles for the filing and consideration of complaints through the petition to deny process. During other periods they produce little, if any, response. ABC further believes that the timing of the post-filing announcements is satisfactory. NBC suggests that a single announcement be broadcast year-round on a uniform schedule. The Maryland-D.C.-Delaware Broadcasters Association supports the NRBA proposal.

62. While we do not fully agree with the ABC and NAB proposals, there is merit to their logic for making these announcements coincide with the license renewal process. Commission scrutiny of all but egregious licensee conduct occurs in connection with a licensee's application for renewal of license. To the extent that the listening public should be educated concerning the Commission's oversight functions and the availability of public recourse at the Commission, this can be accomplished every two and one-half years in connection with the pre- and post-filing announcements made by all licensees. There is no overriding need to require these year-round regular announcements. We therefore, believe that there is adequate justification for elimination these regular announcements and do so herein.

63. However, we view both the pre- and post-filing announcements as elements in alerting the public to this ability to participate in the renewal process. Standing alone, compliance with the textual and timing requirements of the pre- and post-filing announcements do not appear overly burdensome and will be retained.[14] Finally, we have established times for the announcements made by applicants for modification, assignment or transfer of an operating station. These will be made during hours of peak audience participation as set out in our amendment to § 73.3580 of our rules (Appendix B).

Summary of Action

64. Having discussed, in detail, our new renewal forms and procedures and the reasons for these new procedures, the new requirements may be summarized as follows:

1. *Commerical Radio*—All commercial radio licensees filing for renewal of license will file the SRA (Appendix C).[15] Radio licensees will file for renewal according to the existing filing dates. Radio licensees will not be subject to the long form random audit or on-site Broadcast Bureau audit. Radio licensees will, however, be subject to random FOB inspections of their technical operations and public files. In addition, as in the past, should serious compliance problems be brought to the Commission's attention, radio licensees will be subject to field investigations by Commission personnel.

[14]The text of the announcements will, however, be changed for commercial radio licensees to conform with actions taken in our *Radio Deregulation* proceeding. Since commercial radio licensees no longer make proposals concerning future programming, the language in the announcement dealing with those proposals will be eliminated for these licensees.

[15]The SRA will be mailed with a copy of the required Privacy Act notification. 5 U.S.C. 552a(e)(3).

II. *Commercial Television*—Most television licensees will file the SRA at renewal time. In addition, at least 5 percent of television licensees will file the long form audit instead of the SRA. *Television licensees will not be required to file both forms* unless the Commission determines that the long form is required to elicit further information from the licensee. Promises made to the Commission concerning programming and commercial time will remain in effect until amended by filing with the Commission. Television licensees will also be subject to FOB inspections of their technical operations and public files as well as random Broadcast Bureau field audits. As with radio, serious compliance problems may result in field investigations. Television licensees will no longer be required to file a balance sheet at renewal time or FCC Form 303—A (the Annual Programming Report).

III. *Noncommercial Radio and Television*—Noncommercial radio and television renewal applicants will file the SRA. At least 5 percent will file the long form audit instead of the SRA. They will also be subject to FOB inspections of their technical operations and public files as well as random Broadcast Bureau field audits. Promises made to the Commission concerning programming will remain in effect until amended by filing with the Commission.

IV. *All Licensees*—All licensees will continue to file a model EEO program and list any complaints filed against the licensee relating to discrimination. All licensees will continue to make pre- and post-filing announcements as presently set forth in the Commission's rules.[16] The

[16] All licensees will certify that these announcements were made by placing a statement to that effect in their public files. For applicants for renewal of license this will be done in lieu of the requirements of § 73.3580(h) of the rules. Renewal applicants will not file these certifications with the Commission.

The interim announcements required by § 73.1202 of the rules have been eliminated for commercial licensees. The Ownership Reports for commercial and noncommercial licensees need not be filed every three years at renewal time provided the report on file with the Commission has not been amended. Questions relating to technical performance have been eliminated from commercial and noncommercial renewal applications. The Commission will rely upon FOB inspections and complaints to monitor technical compliance. We will presume for audited and unaudited applicants that renewal without modification is requested for currently authorized auxiliary antennas and transmitters, alternate transmitters requiring authorization, subsidiary communications authorization, remote pickup broadcast stations (automatic mobile relay, base or mobile), low power broadcast auxiliary, aural broadcast STV and intercity relay and TV auxiliary broadcast stations (TV pickup, TV STL, TV intercity and TV translator relay stations). Questions on renewal applications and on FCC Form 313R concerning these services will be eliminated. If there has been a change in the information shown on the previously filed license application for one of these services, the appropriate FCC form must be filed. When an application for modification of such an authorization is pending, any renewals which are granted shall be considered a renewal of the currently authorized services. Also, if a licensee authorized to use one of these services no longer needs such a service, the licensee should notify the Commission and return the authorization to us.

Effective Dates

65. The modifications adopted herein concerning public notice requirements, and the filing of ownership reports, engineering information, classification of radio program formats, and balance sheets are effective June

10, 1981. Phasing in the audit and inspection procedures adopted herein would be unnecessarily complex. We will, therefore, mail the SRA and audit forms to licensees as soon as possible after the Office of Management and Budget approval of these forms is obtained. Public Notice of that date will be released by the Broadcast Bureau. The review process for FOB public file inspections will begin after June 1, 1981. This will provide adequate time for all licensees to be apprised of these new procedures.

66. Accordingly, it is ordered, that the rule changes set out in Appendix B of this *Report and Order,* are adopted, effective June 10, 1981.

67. It is further ordered, that subject to approval by the Office of Management and Budget, the forms set out in Appendices, C, D, and E are adopted. After adoption of these new forms and implementation of these new renewal methods, FCC forms 303, 303A, 303R, 313R and 342 are eliminated.

68. It is further ordered, that the petition filed by the National Radio Broadcasters Association, is granted, to the extent indicated above.

69. It is further ordered, that this proceeding is terminated.

Federal Communications Commission.
William J. Tricarico,
Secretary.

Appendix A

Parties Filing Comments in BC Docket No. 80-253

Illinois Eastern Community Colleges
Action for Children's Television
National Citizens Committee for Broadcasting and
Public Media Center

Smith & Pepper
West Virginia Board of Regents
Storer Broadcasting Company
Department of Communication, U.S. Catholic Conference
National Public Radio
Ohio Association of Broadcasters, Inc.
Broadcast Licensees:
Advance Broadcasting Corporation
Argonaut Broadcasting Company
Bahia de San Francisco Television Company
Broadcasting Associates of America, Inc.
Buford Television, Inc.
Central Broadcasting Corporation
James Porter Clark
Collinsville Broadcasters, Inc.
Enterprise Publishing Company
Entertainment Enterprises, Inc.
Forward Communications Corporation
GCC Communications of Houston, Inc.
Golden Plains, Inc.
Greater Ocala Broadcasting Corporation
Group One Broadcasting Company
Guaranty Broadcasting
Hennepin Broadcasting Associates, Inc.
Hudson Broadcasting Corporation
Huntsville Broadcasting Company, Inc.
Infinity Communications Corporation
Interurban Broadcasting Corporation
K-Six Television, Inc.
KFAB Broadcasting Company
KMAP, Inc.
KOMW, Inc.
KRLA, Inc.
Kuila Broadcasting Company
Lake Broadcasting Co., Inc.
Lake Huron Broadcasting Corporation
Lakeland Broadcasting Company
Laurens County Broadcasting Co., Inc.
M & S Broadcasting Group, Inc.

Mark/Way, Inc.
May Broadcasting Company
Jack Mayer d/b/a Radio Station WDXN
Mini Cassia Broadcasting, Inc.
Oyate, Inc.
John H. Phipps Broadcasting Stations, Inc.
Plains Television Corporation
Powell Broadcasting Co., Inc.
Prime Time Alaska, Inc.
R & R Broadcasting
Radio Marshall, Inc.
Radio Rock Mid-Ocean Broadcasting Corporation
Retlaw Enterprises, Inc.
E.O. Roden & Associates, Inc.
Sam, Inc.
San Juan Radio, Inc. — Bellingham Buyer, Inc.
Sel Thom Communications, Inc.
Service Broadcasters, Inc.
Seven Hills Television Company
Shamrock Broadcasting Company, Inc.
Sillerman-Morrow Broadcasting Group, Inc.
Slater Broadcasting Company
Southern Television Corporation
Spanish International Communications Corporation
Studio Broadcasting System, Division of Highwood Service, Inc.
Summit Radio Corporation
Suncoast Stereo Corporation
Tacoma School District #10
Telerad, Inc.
Tri-Cities Broadcasting Company
Tri-Cities Broadcasting, Inc.
WBIP Broadcasting Corporation
Weigel Broadcasting Co.
Ralph C. Wilson Industries, Inc.
WFDF Corporation
WICS-Tv, Inc.
Wilson Communications, Inc.
WIXT Television, Inc.
WKRG-TV, Inc.

WTRP Broadcasting, Inc.
Ziff-Davis Broadcasting Company
Citizens Communications Center, *et al.*
National Association for the Advancement of Colored People
National Media Task Force of the National Organization for Women
National Black Programming Consortium
Black Citizens for a Fair Media
Chinese for Affirmative Action
National Council of La Raza
National Broadcasting Company
Joint Comments:
Cox Broadcasting Corporation
Fetzer Broadcasting Corporation
Fetzer Television Corporation
Kent State University
Lancaster Palmdale Broadcasting Corporation
Lehigh Valley Public Television
McClatchy Newspapers
Newhouse Broadcasting Corporation
Radio House, Inc.
Southwestern Sales Corporation
Radio House, Inc.
Southwestern Sales Corporation
State Telecasting Company, Inc.
University of Washington
WBML, Inc.
American Broadcasting Companies
CBS, Inc.
Maryland-District of Columbia-Delaware Broadcasters Association, Inc.
KEZY Radio, Inc.
Office of Communications of the United Church of Christ
National Radio Broadcasters Association
National Association of Broadcasters
General Electric Broadcasting Company, Inc.
Committee for Community Access
Educational Broadcasting Corporation

Parties Filing Reply Comments

American Broadcasting Companies, Inc.
Broadcast Licensees (same as above)
Citizens Communications Center, et al. (same as above)
General Electric Broadcasting Company, Inc.
National Association of Broadcasters
National Black Media Coalition
National Federation of Community Broadcasters
Department of Communication, United States Catholic Conference

Comments and Reply Comments on the NRBA Proposal (RM-2898) Filed Prior to Issuance of the Notice in this Proceeding

Comments

American Broadcasting Companies, Inc.
Joint Statement:
- Forward Communications Corporation
- Fredric A. Danz
- General Electric Broadcasting Company, Inc.
- Group One Broadcasting Co.
- Kale, Inc.
- Keedo, Inc.
- Sterling Recreation Organization Co.
- Summit Radio Corporation
- Vision Corporation
- Whatcom Management Co.
- WKRG-TV, Inc.

National Citizens Committee for Broadcasting

Reply Comments

National Radio Broadcaters Association

Appendix B

Rule Changes

§ 73.1202 [Amended]

1. 47 CFR Part 73 is amended by removing §§ 73.1202 (a), (b), (c), and (d).

2. 47 CFR Part 73 is amended by revising the heading of § 73.1202 to read as follows:

§ 73.1202 Retention of letters received form the public.

• • • • • •

3. 47 CFR Part 73, is amended by renumbering § 73.1202(e) as § 73.1202(a) (subparagraphs (1) and (2) of new § 73.1202(a) remain unchanged).

4. 47 CFR Part 73 is amended by revising the introductory text of § 73.3615(a) to read as follows:

§73.3615 Ownership reports.

(a) Each licensee of a commercial AM, FM or TV broadcast station shall file an ownership report on FCC Form 323 at the time the application for renewal of station license is required to be filed. Licensees owning more than one AM, FM or TV stations need file only one Ownership Report at 3-year intervals. Licensees with current and unamended Ownership Reports on file at the FCC may so indicate on their renewal applications and be relieved of the obligation to file a new Ownership Report. Ownership Reports shall give the following information as of a date not more then 30 days prior to the filing of the Ownership Report:

(1) • • •

(2) • • •

• • • • •

5. 47 CFR Part 73 is amended by revising § 73.3526 (a)(8), (a)(9), the introductory text of (a)(11), and the flush paragraph following (a)(11)(v) to read as follows:

§73.3526 Local public inspection file of commercial stations

(a) * * *

* * * * *

(8) For TV stations, the licensee's or permittee's program logs for the composite week and a Statement of TV Program Service placed in the public file on the date that the licensee's renewal application is due to be filed at the FCC.

(9) To be placed in the public inspection file every year, on the anniversary date on which the station's renewal application would be due for filing with the FCC, a listing of no more than ten significant problems and needs of the area served by the station during the preceding twelve months. In relation to each problem or need cited, licensees and permittees shall indicate typical and illustrative programs or program series, excluding ordinary news inserts of breaking events (the daily or ordinary news coverage of breaking newsworthy events), which were broadcast during the preceding twelve months in response to those problems and needs. Such a listing shall include the title of the program or program series, its source, type, brief description, time broadcast and duration. The third annual listing shall be placed in the station's public inspection file on the due date of the filing of the station's application for renewal of license. Additionally, if called for by the application for renewal of license, the three annual problems-programs listings shall be forwarded to the FCC as part of that application. The annual listings are not to exceed five pages, but may be supplemented at any time by additional material placed in the public inspection file and

indentified as a continuation of the information submitted to the FCC.

(i) * * *
(ii) * * *
(iii) * * *
(iv) * * *
(v) * * *

Additionally, on the due date of the filing of the station's application for renewal of license each commercial TV licensee shall deposit in its public file, and forward to the FCC if called for by the application, a checklist indicating the number of community leaders interviewed during the current license term representing the several elements found on the form, provided that, if a community lacks one of the enumerated institutions or elements, the licensee or permittee shall so indicate by providing a brief explanation on its checklist.

* * * * *

6.47 CFR Part 73, § 73.3527 is amended by revising the introductory text of (a)(7), (a)(7)(i), (b), the flush paragraph following (c)(1)(v), the introductory text of (c)(2)(ii) and (c)(2)(iii) to read as follows:

§73.3527 Local public inspection file of noncommercial educational stations.

(a) * * *

* * * * *

(7) Problems-programs lists as follows:

(i) Every year, on the anniversary date on which the station's renewal application would be due for filing with the FCC, each nonexempt renewal applicant shall place in its public inspection file a listing of no more than ten significant problems and needs of the area served by the station

during the preceding twelve months. In relation to each problem or need cited, licensees and permittees shall indicate typical and illustrative programs or program series, excluding ordinary news inserts of breaking events, which were broadcast during the preceding twelve months in response to those problems and needs. Such a listing shall include the title of the program or program series, its source, type, brief description, time broadcast and duration. Renewal applicants shall place the third annual listing in the station's public inspection file on the due date of the filing of the station's application for renewal of license. If called for by the renewal application, the three annual problems-programs lists shall be forwarded to the FCC as part of the application for renewal of license. The annual listings are not to exceed five pages each, but may be supplemented at any time by additional material placed in the public inspection file and identified as a continuation of the information submitted to the FCC.

* * * * *

(b) *Records to be maintained by non-exempt applicants, permittees, and licensees in the noncommercial educational radio service.* In addition to the requirements set out in paragraph (a) of this section, each radio applicant, permittee and licensee in the noncommercial educational radio service shall place in its public inspection file at such time as its renewal application would ordinarily be filed with the FCC — or in the case of applicants other than for renewal of license, at the time the application is filed — a narrative statement detailing the sources consulted and the methods followed in conducting its ascertainemnt of community needs and interests and summarizing principal needs and interests discovered through that survey. If called for by the application, these items shall also be filed with the FCC.

(c) * * *
(1) * * *
(i) * * *
(ii) * * *
(iii) * * *
(iv) * * *
(v) * * *

Additionally, each licensee and permittee shall place in the station's public inspection file and if called for in the renewal application each licensee shall forward to the FCC as part of the application for renewal of license, a checklist indicating the number of community leaders interviewed during the current license term representing elements found on the sample community leader checklist (see *Ascertainment of Community Problems by Broadcast Renewal Applicants,* 41 FR 1372, 1384 (1976): *Provided,* That, if a community lacks one of the enumerated institutions or elements, the licensee and permittee shall so indicate by providing a brief explanation on its checklists. The same rules apply to applicants for other than renewal of license except that the checklist for an ascertainment of community leaders shall reflect information obtained within six months prior to filing and shall be placed in the public file no later than the time the application is filed.

(2) * * *
(i) * * *

(ii) *Information regarding the public survey.* An applicant for other than renewal of license shall conduct a random survey of the general public in its community of license within six months prior to filing its application, and shall file the information requested in paragraph (c)(2)(ii)(A), of this section. Applicants for renewal of license may, at their option, conduct a random general public survey, periodic call-in program, periodic public

meetings or a combination of the latter two methods. If called for in the renewal application, licensees shall file information describing the methods used as set out in paragraphs (c)(2)(ii)(A), (B), and (C) of this section as a part of their renewal applications:

(A) * * *
(B) * * *
(C) * * *

(iii) The information requested in paragraphs (c)(2)(ii)(A), (B), and (C) of this section shall be placed in the public inspection file within a reasonable time after completion of the public ascertainment — or severable portion thereof, such as each call-in program or public meeting — but in no event later than the due date for filing the application, and if called for in the application it shall be filed with the FCC as a part of the renewal application. The demographic information requested in paragraph (c)(2)(i) of this section shall be deposited in the public file no later than the time at which the information called for by (c)(2)(ii) of this section, or some portion thereof, is deposited.

* * * * *

7.47 CFR Part 73 is amended by revising Section 73.3580(d)(3)(i) to read as follows:

§ 73.3580 Local public notice of filing of broadcast applications.

* * * * *

(d) * * *
(1) * * *
(2) * * *
(3) * * *

(i) At least once daily on four days in the second week immediately following either the tendering for filing of the application or immediately following notification to the

applicant by the FCC that Public Notice is required pursuant to §§ 73.3571, 73.3572, 73.3573 or § 73.3578. For commercial radio stations these announcements shall be made between 7 a.m. and 9 a.m. and/or 4 p.m. and 6 p.m. For stations which neither operate betwen 7 a.m. and 9 a.m. nor between 4 p.m. and 6 p.m., these announcements shall be made during the first two hours of broadcast operation. For commercial TV stations, these announcements shall be made between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain time).

§ 73.3580 [Amended]

8. 47 CFR Part 73 is amended by revising the introductory texts of § 73.3580 (d)(4)(i) and (d)(4)(ii) to read as follows:

* * * * *

(d) * * *

(4) * * *

(i) *Pre-filing announcements.* During the period and beginning on the first day of the sixth full calendar month prior to the expiration of the license, and continuing to the date on which the application is filed, the following announcement shall be broadcast on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

(On *(date of last renewal grant) (Station's call letters)* was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until *(expiration date).*

Our license will expire on *(date).* We must file an application for license renewal with the FCC *(date four calendar months perior to expiration date).* When filed, a copy of this application will be available for public inspec-

tion during our regular business hours. It contains information concerning this station's performance during the last *(period of time covered by the application)*, (only TV and noncommercial radio say the remainder of this paragraph) and projections of our programming during the next three years.

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (date first day of last full calendar month prior to the month of expiration).

Further information concerning the FCC's broadcast license renewal process is available at (address of location of the station's public inspection file) or may be obtained from the FCC, Washington, D.C. 20554.

(A) * * *
(*1*) * * *
(*2*) * * *
(*3*) * * *

(ii) *Post-filing announcements.* During the period beginning on the date on which the renewal application is filed to the sixteenth day of the next to last full calendar month prior to the expiration of the license, all applicants for the renewal of broadcast station licenses shall broadcast the following announcement on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

On *(date of last renewal grant) (Station's call letters)* was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until *(expiration date)*.

Our license will expire on *(date)*. We have filed an application for renewal with the FCC.

A copy of this application is available for public inspection during our regular business hours. It contains information concerning this station's performance during the last *(period of time covered by application,* (only TV and noncommercial radio say the remainder of this paragraph) and projections of our programming during the next three years.

Individuals who wish to advise the FCC of facts relating to our renewal applcation and to whether this station has operated in the public interest should file comments and petitions with the FCC by *(date first day of last full calendar month prior to the month of expiration).*

Further information concerning the FCC's broadcast license renewal process is available at (address of location of the station's public inspection file) or may be obtained form the FCC, Washington, D.C. 20554.

(A) * * *

* * * * *

BILLING CODE 6712-01-M

Appendix C

FCC Form 303-S
March 1980

United States of America
Federal Communications Commission
Washington, D.C. 20554

Approved by GAO
B-180227(R0)

Application for Renewal of License for Commercial and Non-Commercial AM, FM or TV Broadcast Station

1 Name of Applicant	Call Letters	Street Address	City	State	Zip Code

2 Are the following reports on file at the Commission

(a) The three most recent Annual Employment Reports (FCC Form 395)
☐ Yes ☐ No
If No, attach as Exhibit No ___ an explanation

(b) The applicant's Ownership report (FCC Form 323 or 323-E)
☐ Yes ☐ No
If No, give the following information
Date last ownership report was filed
Call letters of the renewal application with which it was filed

3 Is the applicant in compliance with the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments?
☐ Yes ☐ No If No, attach as Exhibit No an explanation

4 Since the filing of the applicant's last renewal application for this station or other major application, has an adverse finding been made, a consent decree been entered, or final action been approved by any court or administrative body with respect to the applicant or parties to the application concerning any civil or criminal suit, action, or proceeding, brought under the provisions of any federal, state, territorial or local law relating to the following: any felony, lotteries, unlawful restraints or monopolies, unlawful combinations, contracts or agreements in restraint of trade, the use of unfair methods of competition; fraud, unfair labor practices, or discrimination?
☐ Yes ☐ No If Yes, attach as Exhibit No ___ a full description, including identification of the court or administrative body, proceeding by file number, the person and matters involved, and the disposition of litigation

5 Has the applicant placed in its public inspection file at the appropriate times the documentation required by Section 73.3526 and 73.3527 of the Commission's rules?
☐ Yes ☐ No If No, attach as Exhibit No ___ a complete statement of explanation

THE APPLICANT hereby waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States, because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act.)
THE APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations and that all the exhibits are a material part hereof and are incorporated herein as set out in full in the application.

CERTIFICATION

I certify that the statements in this application are true, complete and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this _____ day of _____, 19____

Name of Applicant _____

By Signature _____

Title _____

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT. U.S. CODE, TITLE 18, SECTION 1001

BILLING CODE 6712-01-C

APPENDIX D

Federal Communications Commission,
Washington, D.C. 20554

Renewal Application Audit Form for Commercial TV Broadcast Stations

Instructions

A. Your television station has been randomly selected to complete this Renewal Application Audit Form 303—L instead of the Federal Communications Commission's ordinary Renewal Application. This Renewal Application consists of the following sections:

I. General Information
II. Legal
III. Statement of Program Service
IV. Certification

B. Prepare and file two copies of this form and all exhibits with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

C. File this application no later than the first day of the fourth full calendar month prior to expiration is "filed" upon actual receipt in the Secretary's office.

D. In responding to the questions set forth in this form, the applicant may incorporate by reference information already on file with the FCC, provided that:

(1) The information is now on file in another application of FCC form filed by or on behalf of the applicant;

(2) The information is identified fully by reference to the file number, if any, the FCC form number and the filing date of the application or other form containing the information and the page or paragraph referred to; and

(3) After making the appropriate references, the applicant states "No change since date of filing."

Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other forms referred to. The incorporated application or other form, thereafter, in its entirety, must be placed in the applicant's public inspection file.

E. Each exhibit submitted by the applicant must be numbered to match the number of the question the exhibit is responsive to on the form. Date each exhibit. The date must be the same or preceding the date of the applicant's certification (Section IV) of this form. Each exhibit shall set forth the name and official title, if any, of the officer or employee by whom or under whose direction the exhibit was prepared.

F. The name of the applicant must be stated exactly as it appears on the current license.

G. The "composite week" is seven different days of the week during the license term designated by the FCC and is used as the basis for responding to questions in this application. If the station was not operating during any one or more days of the composite week, the applicant should notify the Broadcast Bureau's Renewal and Transfer Division, which will specify substitute dates.

H. A "typical week" is a week which an applicant projects as typical of its proposed weekly operation.

I. A legible copy of this renewal application and all exhibits submitted herewith shall be kept on file, available for public inspection. It shall be maintained at the station's main studio or other accessible place such as a public registry for documents or attorney's office in the com-

munity in which the station is licensed. See Instruction D, above.

J. This application shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; by a member who is an officer, if the applicant is an unincorporated association; by such duly elected or appointed officials as may be competent to do so under the laws of the applicable jurisdiction, if the applicant is an eligible government entity; or by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the applicant, separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

K. Replies to questions contained in this form constitute representations on which the FCC will rely in considering an application for renewal. Thus, time and care should be devoted to the replies so that they will reflect accurately the applicant's responsible consideration of the questions asked. Be sure all necessary information is furnished and all paragraphs are fully answered. Defective or incomplete applications can result in deferral of renewal.

Section I

General Information

1. Name of Applicant _____
Street _____
City _____ State _____ Zip Code _____
Send notices and communications to the following named person at the address indicated below:
Name _____
Street Address _____
City _____ State _____ Zip Code _____

2. Renewal requested for following existing facilities:
Call Letters _____ Channel No. _____
Sharing with (specify stations) _____

Section II

Legal

1. Is applicant's Ownership Report (FCC Form 323) filed with this application?

☐ Yes ☐ No If no, give the date of filing of the last Ownership Report ____ and the station's call letters ____ of the renewal application with which it was filed.

2. Is the applicant in compliance with the provisions of Section 310 of the Communications Act of 1934, as amended, relating to the interest of aliens and foreign governments?

☐ Yes ☐ No If no, attach as Exhibit No. II-2, a full explanation.

3. Since the filing of the applicant's last renewal application for this station or other major application, has an adverse finding been made, a consent decree been

entered, or final action been approved by any court or administrative body with respect to the applicant or parties to the application concerning any civil or criminal suit, action, or proceeding, brought under the provisions of any federal, state, territorial or local law relating to the following: Any felony; lotteries; unlawful restraints and monopolies; unlawful combinations, contracts or agreements in restraint of trade; the use of unfair methods of competition; fraud; unfair labor practices; or discrimination?

☐ Yes ☐ No If yes, attach as Exhibit No. II-4, a full description, including identification of the court or administrative body, the proceeding by file number, the persons and matters involved, and the disposition of the litigation.

Section III

Programming

Definition

The definitions set out below are to be followed in furnishing the information called for by the questions in this Section. The inclusion of various types and sources of programs in the paragraphs which follow is not intended to establish a formula for station operation, but is a method for analyzing and reporting station operation.

1. A. *Sources* of programs are defined as follows:

(i) A. *Local Program* is any program originated or produced by the station, or for the production of which the station is substantially responsible, and which also employs live talent more than 50 percent of the time. Such a program, taped, recorded or filmed for later broadcast

shall be classified as local. A local program fed to a network shall be classified by the originating station as local. All non-network and non-syndicated news programs may be classified as local. Programs primarily featuring syndicated or feature films, or other than non-locally recorded programs shall not be classified as local, even though a station personality appears in connection with such material. However, identifiable units of such programs which are live and separately logged as such may be classified as local (e.g., if during the course of a feature film program a non-network 2-minute news report is given and logged as a news program, the report may be classified as local.

(ii) A. *Network Program* is any program furnished to the station by a network (national, regional or special). Delayed broadcasts of programs originated by networks are classified as network.

(iii) A. *Recorded Program* is any program not defined in (i) and (ii) above, including without limitation, syndicated programs, taped or transcribed programs, and feature films.

B. *Types of programs are defined as follows:*

(i) News Programs include reports dealing with current local, national and international events, including weather and stock market reports; and commentary, analysis or sports news when it is an integral part of a news program.

(ii) *Public Affairs Programs* are programs dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, minidocumentaries, panels, roundtable and vignettes and extended coverage (whether live or

recorded) of public events or proceedings, such as local council meetings, congressional hearings and the like.

(iii) *All Others* (excluding entertainment and sports) include all other programs which are not intended primarily as entertainment (e.g., music, drama, variety, comedy, quiz, etc.). This category does not include play-by-play and pre- or post-game related activities and separate programs of sports instruction, news, or information (e.g., fishing opportunities, golfing instructions, etc.).

(iv) *Programs Designed for Children* include programs originally produced and broadcast primarily for an audience of children twelve years old and under. This does not include programs originally produced for a general or adult audience which may nevertheless be significantly viewed by children. (The definition of "Programs Designed for Children" is not applicable for the purpose of logging, but is applicable only to Questions 6, 14, and 17.

Note.— If a program contains two or more identifiable units of program material which constitute different program types as herein defined, each such unit may be separately classified.

C. *Commercial Matter* includes commercial continuity (network and non-network) and commercial announcements (network and non-network) as follows:

(i) *Commercial Continuity* is the advertising message of a program sponsor.

(ii) A. *Commercial Announcement* is any other advertising message for which a charge is made, or other consideration is received.

(1) Included are:
(i) "bonus spots"

(ii) "trade-out spots"

(iii) Promotional announcements by a commercial broadcast station for or on behalf of another commonly owned or controlled broadcast station serving the same community. See *Report and Order* in Docket No. 20588, 59 F.C.C. 2d 594, 41 FR 22055 (1976)

(iv) Promotional announcements of a future program where consideration in received for such an announcement or where such announcement identifies the sponsor of the future program beyond mention of the sponsor's name as an integral part of the title of the program (e.g., where the agreement for the sale of the time provides that the sponsor will receive promotional announcements, or when the promotional announcement contains a statement such as TOMORROW SEE—(NAME OF PROGRAM)—BROUGHT TO YOU BY—(SPONSOR'S NAME)).

(2) Other announcements including but not limited to the following *are not* commercial announcements:

(i) Promotional announcements, except as defined above.

(ii) Station identification announcements for which no charge is made.

(iii) Announcements of taped, filmed or recorded material.

(iv) Public service announcements.

(v) Announcements made pursuant to § 73.1212(d) of the FCC Rules that materials or services have been furnished as an inducement to broadcast a political program involving the discussion of controversial public issues.

(vi) Announcements made pursuant to the local notice requirements of § 73.3580 ("Local Notice of Filing of Ap-

plications"), § 73.3594 ("Local Notice of Designation for Hearing") and § 73.1202 ("Public Notice of Licensee Obligations") of the FCC Rules.

2. A *Public Service Announcement* is any announcement (including network) for which no charge is made and which promotes programs, activities or services of federal, state or local governments (*e.g.*, recruiting, sales of bonds, etc.) or the programs, activities or services of nonprofit organizations (*e.g.*, UGF, Red Cross blood donations, etc.) and other announcements regarded as serving community interests, excluding time signals, routine weather announcements and promotional announcements.

3. A *Program* is an identifiable unit of program material, logged as such, which is not an announcement as defined above (*e.g.*, if, within a 30 minute entertainment program, a station broadcasts a one-minute news and weather report, this news and/or weather report may be separately logged and classified as a one-minute news program and the entertainment portion as a 29 minute program).

4. *Network Programs.* Where information for the composite week is called for herein with respect to commercial matter or program type classification in connection with network programs, the applicant may rely on information furnished by the network.

5. Replies relating to future operation constitute representations against which subsequent operation of the station will be measured. Accordingly, beginning with this upcoming license term and *until the filing of the station's next Renewal Application Audit Form,* if the station substantially alters its programming or commercial practice, the applicant should notify the Commission of such changes at that time; otherwise it is presumed that the sta-

tion is being operated substantially as proposed. Since the filing of the aduit form is determined by random selection, the next time that your station will be audited is not predetermined.

Section III

Programming

Call letters _____

1. Has the applicant placed in its public inspection file at the appropraite times the required documentation relating to its efforts to ascertain community problems, needs and interests?

( ) Yes ( ) No ( ) Does not apply

If No, attach as Exhibit III-1 a complete statement of explanation.

2. Attach as Exhibit III-2 applicant's community leader checklist for the preceding license term.

( ) Does not apply

3. Has the applicant placed in its public inspection file at the appropriate times its annual list of those problems, needs and interests which, in the applicant's judgment, warranted teratment by its station and typical and illustrative programming in resposne theretto?

( ) Yes ( ) No

If Yes, attach those listings as Exhibit III-3.

If No, attach as Exhibit III-3 a complete statement of explanation.

4. A. State, for the composite week:

(a) The total number of public service announcements broadcast;

(b) The number broadcast between 8 a.m. and 11 p.m.

(E) Of the total number of public service announcements broadcast during the composite week state:

(a) the number, which in the licensee's judgment were primarily designed to promote programs, activities or service of organizations or organizational units located in the service area;

Section III

Programming

Call letters _____

(b) the number, which in the licensee's judgment, were primarily designed to promote programs, activities or services of organizations or organizational units located outside the service area;

(c) the number which, in the licensee's judgment, do not readily fall into either (a) or (b) and/or are a combination of both

C. Attach as Exhibit III-4 one exact copy of the program logs for the composite week used as a basis for responding to questions 4, 13 and 14 herein. Applicants using automatic program logging devices must comply with the provisions of § 73.1810(d)(3) of the FCC Rules.

5.A. Was the applicant affiliated with one or more national television networks during the past license peirod?

( ) Yes ( ) No

If Yes, give the name(s) of the Net-works(s);

; ;

B. If the applicant had more than one such affiliation, which network was its principal source of network programs .

C. If a network affiliate, did the applicant regularly carry (*i.e.*, carry more than 50%) the available news and

public afairs programs offered by the network during the current license period?

News ( ) ( ) No

Public Affairs ( ) Yes ( ) No

6y. In Exhibit III-6, give a brief description of programs, program segments or program series braodcast during the license period which were designed for children 12 years old and under. Indicate the source, time and day of broadcast, the frequency of broadcast and program type.

7. A. In the applicant's judgment, does the information supplied in the annual listings of typical and illustrative programs and program segments broadcast to help meet the significant problems and needs of the service area for the current peirod, and the information supplied in questions 4, 5 and 6 above, adequately reflect its programming during the current license period?

( ) Yes ( ) No

B. If the answer is No, the applicant may attach, as Exhibit III-7B such additional information, including the listing of entertainment programs the applicant considers to be of special merit, as may be necessary to describe accurately and present fairly its program service.

Section III — STATEMENT OF TV PROGRAM SERVICE

9. Indicate the minimum amount of time the applicant proposes to devote normally each week to the categories below. Commercial time should be *excluded* in all computations except for the entries in columns 2, 6 and 10 of the total time operating line (line a).

ANTICIPATED TYPICAL WEEK DATA	FROM 6AM TO MIDNIGHT				FROM 6PM TO 11PM (5PM to 10PM CENTRAL AND MOUNTAIN TIME)				FROM MIDNIGHT TO 6AM			
	ALL PROGRAMS		LOCAL PROGRAMS ONLY		ALL PROGRAMS		LOCAL PROGRAMS ONLY		ALL PROGRAMS		LOCAL PROGRAMS ONLY	
	MINUTES OF OPERATION	PERCENTAGE OF TOTAL TIME OPERATING	MINUTES OF OPERATION	PERCENTAGE OF TOTAL TIME OPERATING	MINUTES OF OPERATION	PERCENTAGE OF TOTAL TIME OPERATING	MINUTES OF OPERATION	PERCENTAGE OF TOTAL TIME OPERATING	MINUTES OF OPERATION	PERCENTAGE OF TOTAL TIME OPERATING	MINUTES OF OPERATION	PERCENTAGE OF TOTAL TIME OPERATING
(1)	(2)	(3) 2/	(4) 1/	(5) 2/	(6)	(7) 2/	(8) 1/	(9) 2/	(10)	(11) 4/	(12) 1/	(13)
a. TOTAL TIME OPERATING		100%				100%				100%		
b. NEWS 1/												
c. PUBLIC AFFAIRS 1/												
d. ALL OTHERS (*Exclusive of entertainment and sports*) 1/												

1/ Excluding Commercials
2/ Percentages are of the total minutes of operation reported at the top of column 2.
3/ Percentages are of the total minutes of operation reported at the top of column 6.
4/ Percentages are of the total minutes of operation reported at the top of column 10.

Section III

PROGRAMMING
COMMERCIAL TV

Call letters_____

8. Indicate the minimum amount of time the applicant has devoted to the categories below during the composite week of the past license term. Commercial time should be excluded in all computations except for the entries in columns 2, 6 and 10 of the "TOTAL TIME OPERATING" line (line a).

WEEK DATA	FROM 6AM TO MIDNIGHT				FROM 6PM TO 11PM (5PM to 10PM CENTRAL AND MOUNTAIN TIME)				FROM MIDNIGHT TO 6AM			
	ALL PROGRAMS		LOCAL PROGRAMS ONLY		ALL PROGRAMS		LOCAL PROGRAMS ONLY		ALL PROGRAMS		LOCAL PROGRAMS ONLY	
(1)	MINUTES OF OPERATION (2)	PERCENTAGE OF TOTAL TIME OPERATING (3) 2/	MINUTES OF OPERATION (4) 1/	PERCENTAGE OF TOTAL TIME OPERATING (5) 2/	MINUTES OF OPERATION (6)	PERCENTAGE OF TOTAL TIME OPERATING (7) 3/	MINUTES OF OPERATION (8) 1/	PERCENTAGE OF TOTAL TIME OPERATING (9) 3/	MINUTES OF OPERATION (10)	PERCENTAGE OF TOTAL TIME OPERATING (11) 4/	MINUTES OF OPERATION (12) 1/	PERCENTAGE OF TOTAL TIME OPERATING (13) 4/
a. TOTAL TIME OPERATING		100%				100%				100%		
b. NEWS 1/												
c. PUBLIC AFFAIRS 1/												
d. ALL OTHERS (Exclusive of entertainment and sports) 1/												

1/ Excluding Commercials
2/ Percentages are of the total minutes of operation reported at the top of column 2.
3/ Percentages are of the total minutes of operation reported at the top of column 6.
4/ Percentages are of the total minutes of operation reported at the top of column 10.

8b. If the applicant's composite week programming varied substantially from the relevant programming representations made to the Commission, attach as Exhibit III-8b a statement explaining the variation(s) and reasons therefor.

Section III

Call letters _____

COMMERCIAL TV

10. A. Provide the applicant's proposals for a typical week of:

(a) the minimum number of public service announcements that the applicant proposes to broadcast .

(b) the numnber to be broadcast between 8 a.m.-11 p.m. .

B. Of the total number of public service announcements which the applicant proposes to broadcst in a typical week provide the number which will be primarily designed to promote programs, activities or services of organizations or organizational units located in the service area ; and outside the service area

11. State the number of 60 minute segments during the composite week, begining with the first full clock-hour and ending with the last full clock-hour of each broadcast day, containing the following amounts of commercial matter:

A. Up to and including 8 minutes: ;

B. Over 8 and up to and including 12 minutes; ;

C. Over 12 and up to and including 16 minutes; ;

D. Over 16 minutes: .

In Exhibit III-11, list each segment in category D above, specifying the amount of commercial time in the segments and the day and time of broadcast.

12. State the number of 60 minute segments in the 6 p.m.-11 p.m.(5 p.m.-10 p.m. Central and Mountain Time)

period during the composite week containing the following amounts of commercial matter.

A. Up to and including 8 minutes; ;

(B) over 8 and up to and including 12 minutes; ;

C. Over 12 and up to and including 16 minutes; ;

D. Over 16 minutes:

In Exhibit III-12, list each segment in category D above, specifying the amount of commercial time in the segment, and the day and time of broadcast.

13.A. In the applicant's judgment does the information supplied in questions 11 and 12 adequately reflect its commercial practices?
( ) Yes ( ) No

Section III

Programming

Commercial TV

B. If the anser is No, the applicant may attach as Exhibit III-13 additional material to adequately describe its commercial practices.

C. If the applicant's commercial practices for the period covered by Questions 11 and 12 varied from the representations made to the Commission, attach as Exhibit III-13C a statement explaining the variations and reasons therefor.

14. In Exhibit III-14, submit each 1 hour or ½ hour segment of programming designed for children 12 years old and under broadcast during the license period which contained commercial matter in excess of:

(a) 12 minutes per hour or 6 minutes per ½ hour, Monday through Friday; or

(b) 9½ minutes per hour or 4¾ minutes per hour Saturday and Sunday.

For each programming segment so listed, indicate the length of the segment (*i.e.*, one hour or ½ hour) and the amount of commercial matter contained therein.

15. What is the maximum amount of commercial matter in any 60-minute segment which the applicant proposes normally to allow?

If the applicant proposes to permit this amount to be exceeded at times, state in Exhibit No. III-15 under what circumstance and how often this is expected to occur, and the limits that would then apply.

16. What is the maximum amount of commercial matter in any 60-minute segment between the hours of 6 PM-11 PM (5 PM-10 PM Central and Mountain Time) which the applicant proposes normally to allow?

If the applicant proposes to permit this amount to be exceeded at times, state in Exhibit No. III-16 under what circumstances and how often this is expected to occur, and the limits that would then apply.

17. A What is the maximum amount of commercial matter per hour the applicant proposes to allow in programs broadcast on weekdays (Monday through Friday) which are designed for children twelve years old and under?

If the applicant proposes to permit this amount to exceed 12 minutes, state in Exhibit No. III-17A under what circumstances and how often this is expected to occur, and the limits that would then apply.

B. What is the maximum amount of commercial matter per hour the applicant proposes to allow in programs broadcast on weekends (Saturday and Sunday) which are designed for children twelve years old and under?

If the applicant proposes to permit this amount to exceed 9½ minutes, state in Exhibit II-17B under what circumstances and how often this is expected to occur, and the limit that would then apply.

Noe.—Unless otherwise indicated, it is assumed that proportional commercial time limits apply to ½ hour segments for the purposes of this question.

Section IV

Certification

Call letters _____

The Applicant hereby waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934.)

The applicant acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and are incorporated herein.

This application must be signed in accordance with the requirements of § 783.3513, "signing of Applications."

Willful False Statements Made on this Form Are Punishable by Fine and Imprisonment. U.S. Code, Title 18, Section 1001.

Certification

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this day of 19

Name of Applicant _____

Signature _____

Title _____

FCC Notice to Individuals Required by the Privacy Act

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to determine if the benefit requested is consistent with the public interest. The staff, consisting variously of attorneys, accountants, engineers, and application examiners, will use the information to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the information requested is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be made to provide all necessary information.

The Foreign Notice is Required by the Privacy Act of 1974, Pub. L. 93-579, December 31, 1974, 5 U.S.C. 552(e)(3).

Appendix E

Federal Communications Commission
Washington, D.C. 20554
Renewal Application Audit Form
For Noncommercial Educational
AM, FM and TV Broadcast Stations

A. Your noncommercial station has been randomly selected to complete this Renewal Application Audit Form 303-NL instead of the Federal Communications Commis-

sion's ordinary Renewal Application. This renewal application consists of the following sections:

I. General Information
II. Legal
III. Statement of Program Service
IV. Certification

B. Prepare and file two copies of this form and all exhibits with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

C. File this application no later than the first day of the fourth full calendar month prior to expiration of your license. An application is "filed" upon actual receipt in the Secretary's office.

D. In responding to the questions set forth in this form, the applicant may incorporate by reference information already on file with the FCC, provided that:

(1) The information is now on file in another application or FCC form filed by or on behalf of the applicant.

(2) The information is identified fully by reference to the file number, if any, the FCC form number and the filing date of the application or other form containing the information and the page or paragraph referred to; and

(3) After making the appropriate reference, the applicant states "No changes since date of filing."

Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other forms referred to. The incorporated application or other form, thereafter, in its entirety, must be placed in the applicant's public inspection file.

E. Each exhibit submitted by applicant must be numbered to match the number of the question the exhibit is

responsive to on the form. Date each exhibit. The date must be the same or preceding the date of the applicant's certification (Section IV) of this form. Each exhibit shall set forth the name and official title, if any, of the officer or employee by whom or under whose direction the exhibit was prepared.

F. The name of the applicant must be stated exactly as it appears on the current license.

G. A "typical week" is a week which an applicant projects as typical of its proposed weekly operation.

H. A legible copy of this completed application and all exhibits submitted herewith shall be kept on file, available for public inspection. It shall be maintained at the station's main studio or other accessible place such as a public registry for documents or attorney's office in the community in which the station is licensed. See Instruction D, above.

I. This application shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; by a member who is an officer, if the applicant is an unincorporated association; by such duly elected or appointed officials as may be competent to do so under the laws of the applicable jurisdiction, if the applicant is an eligible government entity; or by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the applicant, separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

J. Replies to questions contained in this form constitute representations on which the FCC will rely in considering an application for renewal. Thus, time and care should be devoted to the replies so that they will reflect accurately the applicant's responsible consideration of the questions asked. Be sure all necessary information is furnished and all paragraphs are fully answered. Defective or incomplete applications can result in deferal of renewal.

Section I

General Information

1. Name of Applicant _____
Street Address _____
City _____
State _____
Zip Code _____

2. Renewal requested for the following facilities:

AM

Call Letters _____
Frequency _____
Power in kilowatts: Night Day
Hours of operation ( ) Unlimited ( )
Daytime only ( ) Limited
Sharing with (specify stations _____ _____
Other (specify) _____
Station Location:
City _____
State _____

FM-Tv

Call Letters Frequency (FM)
Channel No.
(TV) _____
Power in kilowatts FM TV Visual
TV
Aural _____
Hours of operation per week _____
Sharing with (specify stations) _____

Section II

Legal

1. Since the filing of the applicant's last renewal application for this station or other major application, has an adverse finding been made, a consent decree been entered, or final action been approved by any court or administrative body with respect to the applicant or parties to the application concerning any civil or criminal suit, action, or proceeding, brought under the provisions of any federal, state, territorial or local law relating to the following: any felony; lotteries; unlawful restraints and monopolies; unlawful combinations, contracts or agreements in restraint of trade; the use of unfair methods of competition; fraud; unfair labor practices; or discrimination?

( )Yes ( ) No If yes, attach as exhibit II-1 a full description, including identification of the court or administrative body, proceeding by file number, the person and matters involved, and the disposition of the litigation.

2. Is the applicant in compliance with the provisions of Section 310 of the Communications Act of 1934, a amended, relating to the interests of aliens and foreig governments?)

( ) Yes ( ) No If No, attach as Exhibit II-2, full explanation.

3. Are there any documents, instruments, contracts or understandings relating to ownership, use of control of the station facilities, or any right or interest therein?

( ) Yes ( ) No If Yes, attach as Exhibit No. II-3 copies of all such documents, instruments or contracts and state the substance of oral contracts or understandings.

4. Is the applicant's Ownership Report (FCC Form 323E) filed with this application? (See § 73.3615 of the Commission's rules.)

( ) Yes ( ) No If No, give date of filing of the last Ownership Report and the station's call sign of the renewal application with which it was filed.

5. How is the operation of the station financed?

Section III

Call letters _____

COMMERCIAL TV

10. A. Provide the applicant's proposals for a typical week of:

(a) the minimum number of public service announcements that the applicant proposes to broadcast .

(b) the number to be broadcast between 8 a.m.-11 p.m.

B. Of the total number of public service announcements which the applicant proposes to broadcast in a typical week provide the number which will be primarily designed to promote programs, activities or services of organizations or organizational units located in the service area ; and outside the service area

11. State the number of 60 minute segments during the composite week, begining with the first full clock-hour and ending with the last full clock-hour of each broadcast day, containing the following amounts of commercial matter:

A. Up to and including 8 minutes: ;

B. Over 8 and up to and including 12 minutes; ;

C. Over 12 and up to and including 16 minutes; ;

D. Over 16 minutes: .

In Exhibit III-11, list each segment in category D above, specifying the amount of commercial time in the segments and the day and time of broadcast.

12. State the number of 60 minute segments in the 6 p.m.-11 p.m.(5 p.m.-10 p.m. Central and Mountain Time) period during the composite week containing the following amounts of commercial matter.

A. Up to and including 8 minutes; ;

(B) over 8 and up to and including 12 minutes; ;

C. Over 12 and up to and including 16 minutes; ;

D. Over 16 minutes: .

In Exhibit III-12, list each segment in category D above, specifying the amount of commercial time in the segment, and the day and time of broadcast.

13.A. In the applicant's judgment does the information supplied in questions 11 and 12 adequately reflect its commercial practices?

( ) Yes ( ) No

Section III

Programming

Commercial TV

B. If the anser is No, the applicant may attach as Exhibit III-13 additional material to adequately describe its commercial practices.

Section III

Programming

Definitions

The definitions set out below are to be followed in furnishing the information called for by the questions in this Section. The inclusion of various types and sources of programs in the paragraphs which follow is not intended to establish a formula for station operation, but is a method for analyzing and reporting station operation.

1. A. *Sources* of programs are defined as follows:

(i) A *Local Program* is any program originated or produced by the station, or for the production of which the station is substantially responsible, and which also employs live talent more than 50% of the time. Such a program, tapped, recorded or filmed for later broadcast shall be classified as local. A local program fed to a network shall be classified by the originating station as local. All non-network and non-syndicated news programs may be classified as local. Programs primarily featuring syndicated or feature films, or other than non-locally recorded programs shall not be classified as local, even though a station personality appears in connection with such material. However, identifiable units of such programs

which are live and separately logged as such may be classified as local (*e.g.*, if during the course of a feature film program a non-network 2-minute news report is given and logged as a news program, the report may be classified as local).

(ii) *A Network Program* is any program furnished to the station by a network (national, regional or special). Delayed broadcasts or programs originated by networks are classified as network.

(iii) *A Record Program* (Radio Only) is any program not falling within the definition of "local" above, which utilizes phonograph records, electrical transcriptions of taped music, with or without commentary by a local announcer or other station personnel.

(iv) *Other Programs* are any programs not defined above, including without limitation, syndicated film, taped or transcribed programs, and feature films.

B. *Types of programs are defined as follows:*

(i) News Programs include reports dealing with current, local, national and international events, including weather and stock market reports; and commentary, analysis or sports-news when it is an integral part of a news program.

(ii) *Public Affairs Programs* are programs dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, comentaries, discussions, speeches, political programs, documentaries, mini-documentaries, panels, round-tables and vignettes and extended coverage (whether live or recorded) of public events or proceedings, such as local council meetings, congressional hearings and the like.

(iii) *Instructional* includes all programs designed to be utilized by any level of educational institution in the regular instructional program of the institution. In-school,

in-service for teachers and college credit courses are examples of instructional preograms.

(iv) *General Educational* is an educational program for which no formal credit is given.

(v) *Performing Arts* is a program in which the performing aspect predominates such as drama, concert, opera or dance.

(vi) *Light Entertainment* includes programs consisting of popular music or other light entertainment.

(vii) *All others* includes all programs not falling within the defintions of types of programs defined above.

2. *A Program* is an identifiable unit of program material, logged as such, which is not an announcement as defined above (*e.g.*, if, within a 30-minute entertainment program, a station broadcasts a 1-minute news and/or weather report, this news and weather report may be separately logged and classified as a 1-minute news program and the entertainment portion as a 29-minute program.

3. *Network Programs.* Where information is called for herein with respect to program type classification in connection with network programs, the applicant may rely on information furnished by the network.

Section III

Call letters _____

1. Attach as Exhibit III-1 one exact copy of the program logs for a typical week used as a basis for responding to the questions herein. The typical week must be selected from the school term during which the application is filed, or if such term began less than 90 days before the date of filing the application, from the school term immediately

preceding the school term during which the application is filed. Applicants using automatic program logging devides must comply with the provisions of § 73.1810(k)(3) of the Rules.

2. State, for the typical week, the sign-on and sign-off time and total time for weekdays, Saturday and Sunday.

	Weekdays	Saturday	Sunday
Sign-on			
Sign-off			
Total hours on air			
Total week			

3. State, for the typical week, the portion of the schedule obtained from the following sources (totals to equal 100%);

	Hours	Percentage
Local program		
Record program (radio only)		0
Network program		
Other		

4. State, for the typical week, the amount of time devoted to the following types of programs (totals to equal 100%).

	Hours	Percentage
Instructional		
General educational		
Performing arts		
Public affairs		
Light entertainment		
News		
All other		

5. Does the applicant contemplate any material changes in future program service?

( ) Yes ( ) No

If Yes, submit as Exhibit III-5 a statement describing those changes.

6. Wil the applicant present programs of one or more networks during the next license period?

( ) Yes ( ) No

If Yes, give the name(s) of the networks(s)

_____ , _____

7. Is the station either:

(a) a Class "D" FM facility (10 watt) as defined in § 73.506(a)(2) of the Rules?

( ) Yes ( ) No

(b) a station whose programming is entirely instructional?

( ) Yes ( ) No

If Yes to either question, the applicant may omit questions 8 through 12, following.

8. Has the applicant placed in the public inspection file at the appropriate times the required documentation relating to its efforts to ascertain community problems, needs and interests?

( ) Yes ( ) No

If No, attach as Exhibit III-8 a complete statement of explanation.

9. Radio station applicants, attach as Exhibit III-9 the narrative description of these ascertainment efforts as required by § 73.3527 of the Rules.

10. TV station applicants, attach as Exhibit III-10 the narrative description of the public survey as required by § 73.3527 of the Rules.

11. TV station applicants, attach as Exhibit III-11 the community leader checklist for the preceding license term.

12. Has the application placed in its public inspection file at the appropriate times the annual lists of those problems, needs and interests which, in the applicant's judgment, warranted treatment by its station, and illustrative programs broadcast in response thereto?

( ) Yes ( ) No

A. If Yes, attach those lists as exhibit II-12A.

B. If No, attach as Exhibit III-12B a complete statement of explanation.

Section IV

Certification

Call letters _____

The applicant hereby waives any claim to the use of any particular frequency or of the either as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934.)

The applicant acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and are incorporated herein.

This application must be signed in accordance with the requirements of § 73.3613, "Signing of Applications."

Willful false statements made on this form are punishable by fine and imprisonment. U.S. Code, Title 18, section 1001.

Certification

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this

_____ day of

_____, 19 ____

Name of Applicant _____

Signature _____

Title _____

FCC Notice to Individuals Required by the Privacy Act

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934 as amended. The principal purpose for which the information will be used is to determine if the benefit requested is consistent with the public interest. The staff, consisting variously of attorneys, accountants, engineers, and application examiners, will use the information to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the information requested is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to pro-

vide the missing information. Accordingly, every effort should be made to provide all necessary information.

The foregoing notice is required by the Privacy Act of 1974, P.L. 93-579, December 31, 1974, 5 U.S.C. 552(e)(3).

Appendix F

Public Inspection File Inventory — Noncommercial AM, FM and Tv

This inventory list is to be used by Field Operations Bureau personnel to verify the contents of the public inspection files of noncommercial AM, FM or TV licensees.

Licensee: _____

City: _____

State: _____

Call letters: _____

The following documents were in the public inspection file:

	Yes	No
1. Application for construction permit or program test authority if such application was filed within the last 7 yr.	.....	.....
2. Ownership reports covering last 7 yr	.....	.....
3. Annual employment reports for the last 7 yr	.....	|||||||
4. 2 latest equal employment opportunity model programs	.....	.....
5. The Public and Broadcasting — A Procedure Manual	.....	.....
6. 2 latest renewal applications	.....	.....
7. A file for requests for time by candidates for public office (may be empty)	.....	.....
Ascertainment Documentation		
8. Annual problems programs lists for the last 78 yr	.....	.....
9. Statement of sources consulted and ascertainment methology	.....	.....
10. Leader interview documentation for the last 7 yrs	.....	.....
11. 2 most recent community leader checks	.....	.....
12. General public survey documentation for the last 7 yrs.	.....	.....
13. Comunity composition documentation	.....	.....

Public Inspection File Inventory—
Commercial TV

This inventory list is to be used by Field Operations Bureau personnel to verify the contents of the public inspection file of commercial television licensees.

Licensee: _____

City: _____

State: _____

Call letters: _____

The following documents were in the public inspection file:

	Yes	No
1. Application for construction permit or program test authority if such application was filed within the last 7 yr.	.....	.....
2. 2 latest renewal applications	.....	.....
3. Ownership reports covering last 7 yr.	.....	.....
4. Annual Employment reports for the last 7 yr.	.....	.....
5. 2 latest equal employment opportunity model programs	.....	.....
6. The Public and Broadcasting — A Procedure Manual	.....	.....
7. Letters received from members of the public for the last 3 yr.	.....	.....
8. Composite week logs for the last 7 yr.	.....	
9. Statement of TV program service	.....	.....
10. A file for requests for time by candidates for public office (may be empty)	.....	.....
Ascertainment Documentation		
11. Annual problems-program lists for the last 7 yr.	.....	.....
12. Leader interview documentation for the last 7 yr.	.....	.....
13. 2 most recent community leader checklists	.....	.....
14. General public survey	.....	.....

Public Inspection File Inventory—
Commercial Radio

This inventory list is to be used by Field Operations Bureau personnel to verify the contents of the public inspection file of noncommercial AM, FM or TV licensees.

Licensee: _____

City: _____

State: _____

Call letters: _____

The following documents were in the public inspection file:

	Yes	No
1. Application for construction permit or program test authority if such application was filed within the last 7 yr.	.....	.....
2. 2 latest renewal applications	.....	.....
3. Ownership reports covering last 7 yr.	.....	.....
4. Annual Employment reports for the last 7 yr.	.....	.....
5. 2 latest equal employment opportunity model programs	.....	.....
6. The Public and Broadcasting — A Procedure Manual	.....	.....
7. Letters received from members of the public for the last 3 yr.	.....	.....
8. A file for requests for time by candidates for public office (may be empty)	.....	.....
9. Issues-program lists	.....	.....

Appendix G

Section 0.281 was amended in the Radio Deregulation proceeding (46 FR 13888; February 24, 1981). As amended it provides that the following applications for renewal be taken before the full Commission for consideration. The current text of § 0.281(a)(7)-(10) is not being changed nad is reprinted below for the information of the reader.

§ 0.281 Authority delegated

(a)(7) Programming: Commercial matter.

(a)(7)(i) Commercial TV applicants for a new station, or assignment or transfer, or renewal of license, proposing to exceed 16 minutes of commercial matter per hour, or during periods of high dermand for political advertising, providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10% or more of the station's total weekly hours of operation.,

(8) Programming: Program content and ascertainment of community needs.

(8)(i) Applications for new stations or assignments and transfers.

(8)(i)(A) Commercial AM and FM proposals of applicants for new stations and of assignees and transferees that have not submitted a narrative statement of their proposed programming, commercial TV proposals of applicants for new stations and of assignees and transferees (except those made by UHF stations not affiliated with major networks) which project for the hours 6:00 a.m. to 12:00 midnight less than the indicated percentages in one or more of the following categories: 5% total local programming; 5% information (news plus public affairs) programming; and 10% total nonentertainment programming.

(8)(i)(B) Commercial TV proposals of applicants for new stations and of assignees or transferees which contain substantial ascertainment defects which, for any reason, cannot be resolved by further staff inquiry or action. (See 1971 Ascertainment Primer: 27 F.C.C. 2d 650 (1971), 36 FR 4092).

(8)(ii) Applications for renewal.

(8)(ii)(A) commercial TV proposals (except those made by UHF stations not affiliated with major networks) which project for the hours 6:00 a.m. to 12:00 midnight less than the indicated percentages in one or more of the following categories: 5% total local programming 5% informational (news plus public affairs) programming; and 10% total nonentertainment programming.

(8)(ii)(B) Commercial TV proposals containing substantial ascertainment defects which, for any reason, cannot be resolved by further staff inquiry or action. (See 1976 Ascertainment Primer: 57 F.C.C. 2d 418 (1975), *recon. granted in part*, 61 F.C.C. 2d 1 (1976)).

(9) Programming: Substantial shifts in format. Commercial AM, FM, and TV applications disclosing substantial changes affecting either the entertainment or non-entertainment portions of existing formats which raise significant public interest questions, or which are opposed by the listening or viewing public.

(10) Programming: Promise versus performance.

(10)(i) Applications for assignments and tranfers. TV applications for assignment or transfer which vary substantially from the assignor's or transferor's prior representations with respect to commercial practices (as set forth in paragraph (a)(7) of this section), or from the programming categories (as set forth in paragraph (a)(8) of this section), and for which variation there is lacking, in the judgment of Broadcast Bureau, adequate justification in the public interest

FCC 81-447

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Revision of Applications for Renewal of	)	BC Docket
License of Commercial and Noncommercial	)	No. 80-253
AM, FM, and Television Licensees.	)	RM-2898

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1981; Released: October 9, 1981

BY THE COMMISSION:

1. On March 26, 1981, the Commission adopted dramatically new renewal procedures for broadcast licensees. *Memorandum Opinion and Order*, 46 Fed. Reg. 26236, published May 11, 1981. The existing procedure, involving a detailed review of each application at renewal time, was replaced by a five-question simplified renewal application (SRA) used in conjunction with field audits of randomly selected licensees. Reconsideration of that decision (hereinafter *"SRA Order)"* has been requested by Henry Geller.[1] Oppositions to the request for reconsideration have been filed by the National Association of Broadcasters and the American Legal Foundation.[2] In this *Memorandum Opinion and Order* we will consider the petition for reconsideration and will, on our own motion, clarify some of changes adopted in this proceeding.

---

[1] The *SRA Order* has been appealed to the U.S. Court of Appeals for the District of Columbia. *Black Citizens For a Fair Media* v. *FCC*, D.C. Cir 81-1710).

[2] The American Legal Foundation requested an extension of time to respond to the petition for reconsideration. That request is granted for good cause shown.

Reconsideration

2. Geller contends that the Simplified Renewal Application procedure is defective because the Communications Act of 1934, as amended, requires us to review the programming practices of each applicant before granting an application for renewal of license. Also, he is concerned that most licensees are no longer required to tabulate the composite week data from their program logs. Only those commecial television licensees which are selected for audit, must now tabulate their composite week data. He urges us to reimpose this burden on all licensees and not to leave this chore to local citizens who may desire this information.

3. The petition for reconsideration does not contain any arguments not already considered by us. Concerning the adequacy of the SRA as a basis for renewal of license, it was determined that ". . . , the SRA provides us with adequate information to make a determination that a licensee is not in violation of statutory requirements, has filed certain required reports with the Commission and has provided for the local public availability of certain required information. The Commission's mandate to regulate the broadcast industry was broadly conceived to afford this Commission the flexibility it would need to meet new technology and changes in the public need. The Communications Act "leaves it within the discretion of the Commission to decide which facts . . . it wishes to have set forth in applications." *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976). The Commission, therefore, has substantial discretion to reconsider and review the appropriateness of our regulations including the continued need for particular information in connection with renewal applications. We determined that, in the absence of any indications to the contrary, the information supplied by the SRA is suffi-

cient to make the statutory finding that grant of the subject renewal application would serve the public interest. *SRA Order,* at 26240, para. 29. Concerning tabulation of log entries, we found that the burden on licensees in compiling this data is unwarranted. *Id.*, at 26244, para. 53. We believe that our initial decisions on these matters were correct and consistent with the public interest. Therefore, the petition for reconsideration is denied.

Clarification

4. Implementation of these new renewal procedures has generated numerous inquiries from licensees and members of the public. We issued Public Notices on May 4, and June 29, 1981, to clarify concerns that required immediate attention. At this time we will clarify a number of other significant questions.

5. In this proceeding the annual composite week for commercial television licensees was abolished and replaced by a triennial composite week.[3] We also required these licensees to maintain their current program promises in their public files. As amended in this proceeding, Section 73.3526(a)(8) of the Rules requires placement in the public files:

> (8) For TV stations, the licensee's or permittee's program logs for the composite week and a statement of TV program service placed in the public file on the date the licensee's renewal application is due to be filed at the FCC.

---

[3]The recent adoption of Public Law 35, which changed the license terms for television and radio to 5 and 7 years, respectively, will require a number of changes in our rules and policies. These changes in the composite week rules, for example, will be made in a later proceeding.

The "Statement of TV Program Service" is Section 3, Question 9 of the television audit form,[4] and the requirement that a current copy of this statement be in the public file was propounded in an effort to assure that all licensees have a written record of their current programming promises available for local inspection. Licensees do not have tp place a new statement in the public file at renewal time if the statement on file remains current. Finally, we required all licensees to notify us of changes in their programming promises. 46 Fe3d. Reg. 26236, 26244, para. 53. To clarify this we will change that rule to read:

> (8) For TV stations, the licensee's or permittee's program logs for the composite week placed in the public file on the date that the licensee's renewal application is due to be filed at the FCC. Also, TV stations are to maintain in their public files current promises concerning the presentation of news, public affairs and all other nonentertainment programming. Substantial changes[5] shall be compiled on a Statement of TV Program Service, found as Section 3, question 9, of the Television Audit Form, FCC Form 303-C. All substantial changes in programming promises should be entered on a new Statement of TV Program Service and a copy forwarded to the FCC.

---

[4]It is the same as Section IV, page 9 of FCC Form 303, which will be replaced by the SRA and TV audit form. A copy of the Section 3, Question 9 form is attached. Appendix B.

[5]A substantial change is defined as a proposed decrease of 15 percent in any of the three nonentertainment program categories or a 20 percent decrease overall in the categories found on the Statement of Television Program Service. *See Revision of FCC Form 303*, 37 R.R.2d 1, 26, *recons. denied*, 38 RR 2d 755 (1976).

Ownership Reports

6. Licensees with current and unamended ownership reports on file were exempted from the obligation of filing a new ownership report with their renewal applications. Therefore, if the ownership report filed with the station's last renewal application is "up to date" and has not been amended, a new ownership report should not be filed with the current renewal application. Also, if in its last renewal application an applicant referred the Commission to an ownership report filed for another of its stations and that ownership report remains up to date and unamended, a new ownership report should not be filed. An "up to date" ownership report is one that is current for *each* question on that report. Applicants with 50 or more shareholders are not affected by this policy modification and must continue to file annual ownership reports.

Public Inspection File

7. Attached to the *SRA Order* were copies of the inventory forms to be used by our Field Operations Bureau personnel during their on-site inspections of licensee public inspections files.[6] The elements included on these forms were not intended to replace existing public file requirments, only to allow us to check and assure that particularly important documents are being kept. In this respect we believe that for our purposes the most recent copy of a particular form or application is sufficient. In addition we have clarified certain entries on these forms and have eliminated a number of less important elements to speed the FOB review process.[7] See Appendices, C, D and E.[8]

---

[6] *SRA Order*, Appendices C, D and E.

[7] The Broadcast Bureau may make additional changes to these forms in the future, to reflect pertinent changes in our rules and policies.

8. Therefore, IT IS ORDERED, That the petition for reconsideration filed by Henry Geller, IS DENIED.

9. IT IS FURTHER ORDERED, That Section 73.3526(a)(8) of the Rule IS AMENDED, as set forth in Appendix A.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Attachment: Appendix A
*Appendices B, C, D, and E – may be seen in the FCC Dockets Branch or in Broadcast Bureau's Renewal Branch.

Appendix A

1. 47 CFR Part 73 is amended revising Section 73.3526(a)(8) to read as follows:

§ 73.3526 *Local Public Inspection File of Commercial Stations*

(a) • • •

• • • • •

(8) For TV stations, the licensee's or permittee's program logs for the composite week placed in the public file on that date that the licensee's renewal application is due to be filed at the FCC. Also, TV stations are to maintain in their public files current promises concerning the presentation of news, public affairs an all other nonentertainment programming. Substantial changes shall be compiled on a Statement of TV Program Service, found as Section III, question 9 of the Television Audit Form, FCC Form 303-C. All substantial changes in programming promises should be entered on a new Statement of Television Program Service and a copy forwarded to the FCC.

• • • • •

2. 47 CFR Part 73 is amended by removing Section 73.3610.

3. 47 CFR Part 73 is amended by revising Section 73,3500, removing reference to 303-A, 342, 313-R and 303, and adding:

303-S Standard Application for Renewal of License for Commercial Broadcast Station.

303-C Renewal Application Audit FVorm for Comemrcial TV Broadcast Stations.

303-N Renewal Application Audit Form for Noncommercial Educational AM, FM and TV Broadcast Stations.

313-R Application for renewal of Auxiliary Broadcast License (Short Form).

Office - Supreme Court, U.S.
FILED
MAY [illegible]
ALEXANDER L. STEVAS,
CLERK

No. 83-1498

In the Supreme Court of the United States

OCTOBER TERM, 1983

BLACK CITIZENS FOR A FAIR MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRUCE E. FEIN
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Attorney
Federal Communication Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the Federal Communications Commission abused its discretion in adopting a simplified renewal system for licenses for radio and television broadcasting stations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Alianza Federal de Mercedes v. *FCC*, 539 F.2d 732 11

Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315, 5 F.C.C. 2d 175 2

Broadcast License Renewals, 43 F.C.C.2d 1 12

CBS Inc. v. *FCC*, 453 U.S. 367 10

Deregulation of Radio, 84 F.C.C. 2d 968, reconsid. denied, 87 F.C.C. 2d 797, aff'd in part and remanded in part, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 ..... 4, 13, 14

FCC v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 8

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 ..... 7, 9

FCC v. *Schreiber*, 381 U.S. 279 9

Page

Cases—Continued:

FCC v. *WNCN Listeners Guild*, 450 U.S. 582 ..... 7, 8, 9

FCC v. *WOKO, Inc.*, 329 U.S. 223 10

Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 27 F.C.C. 2d 697 2

Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 44 F.C.C. 2d 405 2

Las Vegas Valley Broadcasting Co. v. *FCC*, 589 F.2d 594, cert. denied, 441 U.S. 931 10

National Ass'n of Regulatory Utility Commissioners v. *FCC*, 525 F.2d 630, cert. denied, 425 U.S. 992 10

National Broadcasting Co. v. *United States*, 319 U.S. 190 8

National Citizens Committee for Broadcasting v. *FCC*, 567 F.2d 1095, cert. denied, 436 U.S. 926 7

Office of Communication of the United Church of Christ v. *FCC*, 359 F.2d 994 ..... 11, 13

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 10

Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto, 52 F.C.C. 2d 184 2

Page

Cases—Continued:

Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto, 59 F.C.C. 2d 750 2

United Broadcasting Co. v. *FCC*, 565 F.2d 699, cert. denied, 434 U.S. 1046 10

United States v. *WHAS, Inc.*, 385 F.2d 784 10

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 579 9

Wadeco, Inc. v. *FCC*, 628 F.2d 122 10

White Mountain Broadcasting Co. v. *FCC*, 598 F.2d 274, cert. denied, 444 U.S. 963 10

Statutes and regulations:

Communications Act of 1934 47 U.S.C. (& Supp. V) 301 *et seq.* :

§ 307(c), 47 U.S.C. 307(c) 6
§ 308(a), 47 U.S.C. 308(a) 2
§ 308(b), 47 U.S.C. 308(b) 2, 10
§ 309(a), 47 U.S.C. 309(a) 6
§ 312(a)(7), 47 U.S.C. 312(a)(7) 10
§ 315, 47 U.S.C. 315 10
§ 315(a), 47 U.S.C. 315(a) 10
47 U.S.C. 317 10

Pub. L. No. 97-259, § 112, 96 Stat. 1093 2

44 U.S.C. (Supp. V) 3501-3520 8

Page

Statutes and regulations—Continued:

47 C.F.R. (1983):

Section 73.1020 2
Section 73.3526 ..... 6, 12
Section 73.3527 ..... 6, 12

Miscellaneous:

FCC, *Broadcast Procedure Manual*, 49 F.C.C.2d 1 (1974) 6

45 Fed. Reg. 47444 (1980) 3

49 Fed. Reg. 19019 (1984) 4, 13

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1498

BLACK CITIZENS FOR A FAIR MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 719 F.2d 407. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 65a-160a) is reported at 46 Fed. Reg. 26236 (1981).

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1983 (Pet. App. 63a). Rehearing was denied on December 12, 1983 (Pet. App. 60a-61a). The petition for a writ of certiorari was filed on March 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the decision of the Federal Communications Commission to simplify the application that all radio and television broadcast stations must submit to

the Commission in order to have their licenses renewed, and to modify related license renewal procedures.

Section 308(a) of the Communications Act of 1934, 47 U.S.C. 308(a), provides that the Commission may grant license renewals "only upon written application therefor * * *."[1] Section 308(b), 47 U.S.C. 308(b), grants the Commission broad discretion to specify the content of applications, including renewal applications.[2] The Commission has revised the broadcast license renewal application forms as experience or circumstances have dictated. It has added questions reflecting the implementation of new or modified policies, and it has eliminated questions as its policies or regulatory needs have changed.[3]

---

[1]The license term is now five years for television broadcast stations and seven years for radio broadcast stations. See Pub. L. No. 97-259, § 112, 96 Stat. 1093; 47 C.F.R. 73.1020.

[2]That section provides in relevant part that applications for station licenses and renewals "shall set forth such facts as the Commission by regulation may prescribe as to the * * * qualifications of the applicant to operate the station; the ownership and location of the proposed station * * *; the frequencies and the power desired to be used; the hours * * * during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require". The Commission is also authorized to require the licensee to provide additional information at any time during the term of the license.

[3]See, *e.g.*, *Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315*, 5 F.C.C.2d 175 (1966); *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*, 27 F.C.C.2d 697 (1971); *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*, 44 F.C.C.2d 405 (1973); *Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 52 F.C.C.2d 184 (1975); *Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 59 F.C.C.2d 750 (1976).

Although it had been seeking since 1971 to reduce the complexity of its renewal application forms and procedures, the Commission concluded in 1980 that the process remained a complex and burdensome undertaking for both licensees and the agency (Pet. App. 68a-70a). In July 1980 the Commission thus began a rule making proceeding "to determine whether the public interest would be served by a revamping of our broadcast renewal application procedures." *Revision of Application for Renewal of License*, 45 Fed. Reg. 47444 (1980) (C.A. App. 47). The Commission observed that its experience had demonstrated that most licensees had met or exceeded the Commission's operating guidelines. In addition, the Commission pointed out (C.A. App. 48) that in the case of the relatively few licensees whose performance had been deficient, public participation, rather than agency scrutiny of the renewal application form itself, had been the best vehicle for calling these licensees to account before the Commission. Based on these considerations, the Commission questioned whether there was a "need to continue the in-depth renewal filings now required, believing that our enforcement role may be better discharged and made more meaningful through taking a 'hard look' at random samplings of license renewal applications." The Commission emphasized (C.A. App. 49) that it was not proposing to alter the substantive standards for obtaining renewals, or to change the agency's method of evaluating citizens' complaints and petitions to deny. It proposed simply to modify the renewal application itself and to make congruent changes in the procedures for ensuring licensee compliance with the public interest standard. Pet. App. 67a, 82a-84a.

Following a period for public comment, the Commission in May 1981 adopted a Report and Order (Pet. App. 65a) which consisted essentially of the proposal made in the June 1980 notice. The Commission's revised renewal procedures are made up of the following basic components:

(1) *The Simplified Renewal Application.* The revised application form (Pet. App. 122a) requires the submission of information concerning the applicant's compliance with statutory provisions and Commission regulations and policies in four areas: equal employment opportunity; alien ownership or control of broadcast stations; matters affecting the applicant's character qualifications; and the applicant's maintenance of a required public file at its station containing certain specified information. Pet. App. 73a-75a, 79a-85a.

(2) *The Long Form Audit.* At least five percent of all television stations and noncommercial radio stations[4] will be required to file an audit form — the so-called "long form audit" — that will provide the Commission with essentially the same information as the old renewal forms.[5] The audit procedure is intended to permit the Commission to take a

---

[4]In a separate proceeding, the Commission had eliminated for commercial radio stations many of the requirements that continued to be applicable to all television stations and noncommercial radio stations. See *Deregulation of Radio*, 84 F.C.C.2d 968, reconsid. denied, 87 F.C.C.2d 797 (1981), aff'd in part and remanded in part, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) 49 Fed. Reg. 19019 (1984). The Commission decided not to subject commercial radio stations to the long form audit because that would "undo the philosophy and impact of [the radio deregulation] proceeding" (Pet. App. 85a). There are presently pending before the FCC two rule making proceedings that propose to adopt for commercial television and noncommercial television and radio stations policies similar to those adopted in the radio deregulation proceeding. See *Commercial TV Stations*, 94 F.C.C.2d 678 (1983); *Public Radio and TV Programming*, 87 F.C.C.2d 716 (1981).

[5]A long form audit application form is reproduced at Pet. App. 123a-155a. The form requires a licensee to explain how it has ascertained the needs and interests of its community and to describe the programming service it has provided, including amounts of nonentertainment programming, children's programming, commercial matter, and public service announcements.

"hard look" at a random sample of renewal applications, "rather than continue the more casual and often uninformative look at the sea of paper flowing into Washington with each renewal cycle." C.A. App. 48, 64. The Commission concluded that a five percent probability of being audited (along with the separate field inspections discussed below) would be "sufficient inducement" for licensees to comply with the agency's rules and policies and would provide "independent assurance" of such compliance. Pet. App. 84a, 88a.

(3) *The Public File Requirement.* The Commission's revised procedures continue to rely on public participation in the renewal process. Accordingly, licensees must maintain relevant information about their operations in their local public inspection file. The Commission concluded that "the information necessary to conduct an in-depth review of a licensee's performance will be available at the station in the public inspection file. Interested citizens need only visit that file to avail themselves of the information necessary to support a complaint or petition to deny, should one be appropriate" (Pet. App. 81a).[6]

---

[6]Stations are required to maintain in their local file available for public inspection: annual and quarterly listings of problems and needs facing the community and illustrative programming that the station has presented in response; comments and suggestions received from the public concerning the station's operations; composite weekly program logs; copies of all major applications that the station has filed with the Commission; ownership reports and related documents; requests for political broadcast time with notations regarding disposition of such requests; materials relating to the station's ascertainment of community problems and needs; the station's current promises concerning the presentation of news, public affairs and other non-entertainment programming; copies of annual employment reports; a copy of the *Broadcast Procedure Manual*, which details the "formal and informal ways for members of the community to convey their grievances to the Commission and to participate in proceedings in which the performance of a

(4) *Field Audits and Inspections.* The Commission also announced procedures for additional audits and inspections by its staff. The local offices of the Commission's Field Operations Bureau (F.O.B.) monitor licensee compliance with the Commission's technical rules by conducting random field inspections and engineering measurements, and by investigating specific complaints. Under the simplified renewal scheme, the F.O.B. makes random field inspections of the technical operations and public files of ten percent of all broadcast licensees subject to license renewal each year. Pet. App. 90a-93a, 155a-158a.

In addition, the Commission stated that its Mass Media Bureau (formerly the Broadcast Bureau) might inspect any licensee submitting a renewal application or long form audit that raises particular concerns, as well as other licensees on a random basis. Pet. App. 93a-95a.

2. Petitions to review the Commission's decision to implement the revised renewal system were filed in the United States Court of Appeals for the District of Columbia Circuit. Petitioners challenged the decision to omit program related questions from the short form renewal application. The court of appeals upheld the Commission's order. It found that the Communications Act (47 USC 307(c), 308(b), 309(a)), read in light of its legislative history, did not require the inclusion of such questions in renewal application forms (Pet. App. 9a-10a).[7] The court also relied

---

station is judged and legitimate grievances are redressed" (49 F.C.C.2d 1, 2 (1974)). 47 C.F.R. 73.3526, 73.3527. The particular requirements vary between television and radio stations and between commercial and noncommercial stations.

[7]The court recognized (Pet. App. 8a-9a) that it was not confronted with any attempt by the Commission either to change the requirement that a licensee broadcast programming that serves the public interest, or to disavow its responsibility to make an affirmative public interest finding before granting license renewal.

on the longstanding Commission practice of making appropriate amendments in the renewal forms (Pet. App. 10a),[8] and this Court's recognition of the Commission's broad discretion in defining the public interest and determining the most appropriate procedures to protect that interest (Pet. App. 11a-12a, citing *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981)).

The court noted (Pet. App. 12a) that the "crux of petitioners' complaint" is that under the simplified renewal system the Commission will not have sufficient information to make the public interest determination required before an application may be granted. The court disagreed, finding that the new renewal procedures continue to provide "several sources of information (direct and indirect) on the basis of which the Commission will make its renewal decision" (Pet. App. 13a). In particular, the court cited (Pet. App. 13a-14a) the fact that "the FCC will have the input of the public [which] is in many ways the most critical information * * *. [Moreover, in light of the history of active public participation in Commission licensing proceedings] public silence supports an inference that a licensee has been complying with FCC policies [,] * * * a factor which the FCC may weigh in making a 'public interest' determination."

The court added that "[n]either the statute nor the legislative history precludes the Commission from inferring service in the public interest by existing licensees, given that the inference is rebuttable and the regulatory environment provides strong incentives for operation in the public interest"

---

[8]The court further observed (Pet. App. 11a) that "the Commission frequently decides to monitor and enforce certain aspects of a licensee's performance — *e.g.*, compliance with the fairness doctrine — on an ad hoc basis rather than at the time for license renewal" citing *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095, 1115-1116 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978).

(Pet. App. 17a-18a). The court finally found (Pet. App. 22a-23a & n.29) that the Commission had acted well within its "substantial discretion"; the agency's "considerable expertise and experience" in working with renewal applications over many years, "which is fully documented in the record, provides a reasoned and rational basis for the decision."[9]

ARGUMENT

This case involves only the question whether the Federal Communications Commission is required to include programming-related questions in the standard license renewal application form. The decision of the court of appeals that there is no such requirement is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. This Court has consistently emphasized that Congress granted the Commission broad discretion in determining how best to achieve the goal of the Communications Act of 1934 "to secure the maximum benefits of radio to all the people of the United States" *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (quoting *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943)).[10]

---

[9]The court also observed (Pet. App. 19a) that the "simplified renewal application also offers concrete benefits in the form of reduced paperwork and expense." This "reduction in regulatory burden," the court concluded, "is not just a result of FCC impulse, but rather stems directly from the Paperwork Reduction Act [44 U.S.C. (Supp. V) 3501-3520] and congressional policy with respect to the FCC. There can be little doubt that this mandate provides further support for the FCC's decision."

[10]The Court's decisions also establish that deference must be afforded the agency's expert knowledge when it is making predictive judgments about the direction in which the future public interest lies. 450 U.S. at 594. The Court added in *WNCN Listeners Guild* that if the agency's judgment should prove incorrect, it "should stand ready to alter its rule if necessary to serve the public interest more fully." *Id.* at 603. See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-795 (1978).

That discretion includes not only the power to define what the public interest requires, but also to determine the procedures for achieving those public interest goals. In the Court's words:

> Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked * * * were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest.

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); accord, *WNCN Listeners Guild*, 450 U.S. at 600 (the Communications Act generally "does not specify how the Commission should make its public-interest determinations"); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-525 (1978) (noting longstanding recognition of principle that "formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments," citing *FCC* v. *Schreiber*, 381 U.S. 279, 289-290 (1965)).[11]

Petitioners contend (Pet. App. 13a-15a) that the "obvious purport" of the Communications Act requires the Commission to seek from renewal applicants some level of information regarding the licensee's performance.[12] But as the court

---

[11]Section 4(j) of the Communications Act , 47 U.S.C. 154(j), which was relied upon by the Court in *FCC* v. *Schreiber*, provides that "[T]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

[12]Petitioners do not explicitly state what additional information they believe that the Commission must elicit on the application form; they imply that the form must reflect fully the applicant's past performance in presenting local, informational, children's, news and public affairs programming. Pet. 13-15.

of appeals observed (Pet. App. 9a), the Communications Act does not specify that the Commission must seek programming information. Section 308(b) of the Act, 47 U.S.C. 308(b), contains no reference to programming information; moreover, that section underscores the broad discretion accorded to the Commission to select the type of information it believes it must obtain from the applicant when it is processing an application.[13]

The Commission has never regarded the renewal application form as the only source of relevant information for the Commission's licensing and other regulatory functions. In fact broadcasters have been subject over the years to a wide range of requirements and policies, including the fairness doctrine, that the Commission has never enforced by seeking information on its renewal application forms.[14] Rather, it ensures compliance with such obligations by imposing penalties for noncompliance and misrepresentations,[15] by

---

[13]Even where a matter is specifically mentioned in Section 308(b), *e.g.*, financial qualifications, the court of appeals has said that the Commission is not required to seek such information if it concludes that it is unnecessary to obtain that information routinely from every applicant. *National Ass'n of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 645 (D.C. Cir. 1975), cert. denied, 425 U.S. 992 (1976).

[14]See, *e.g.*, 47 U.S.C. 315(a) and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); 47 U.S.C. 312(a)(7), 315 and *CBS Inc.* v. *FCC*, 453 U.S. 367 (1981) (political broadcasting); *White Mountain Broadcasting Co.* v. *FCC*, 598 F.2d 274 (D.C. Cir.), cert. denied, 444 U.S. 963 (1979) (billing practices); 47 U.S.C. 317 and *United States* v. *WHAS, Inc.*, 385 F.2d 784 (6th Cir. 1967) (sponsorship identification); *United Broadcasting Co.* v. *FCC*, 565 F.2d 699 (D.C. Cir. 1977), cert. denied, 434 U.S. 1046 (1978) (engineering matters).

[15]See cases cited in note 14 above; see also *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946); *Wadeco, Inc.* v. *FCC*, 628 F.2d 122 (D.C. Cir. 1980); *Las Vegas Valley Broadcasting Co.* v. *FCC*, 589 F.2d 594 (D.C. Cir. 1978), cert. denied, 441 U.S. 931 (1979).

conducting spot checks,[16] and by being alert to citizen complaints.[17] The simplified renewal procedure adopted by the Commission in the proceeding below, which employs these same techniques, is therefore not a dramatic departure from the Commission's longstanding methods for discharging its responsibilities under the Communications Act.[18]

2. Petitioners contend (Pet. 18-20) that even if the statute does not require the comprehensive renewal application form and procedures that they favor, it was nevertheless arbitrary for the Commission to "thrust[] upon the public

---

[16]Even under the Commission's former renewal procedures, it did not review a licensee's entire program schedule, but instead used a random sampling technique. Specifically, radio stations had to submit their logs for a seven-day "composite week" only once every three years and television stations submitted composite week logs only once per year. Similarly, the F.O.B. has always enforced the Commission's engineering rules by random inspections and measurements.

[17]The Commission observed below that in its experience the "best vehicle for bringing violations to our attention has been public participation in our processes" (C.A. App. 48). See also *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003-1005 (D.C. Cir. 1966); *Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732 (D.C. Cir. 1976). In these cases, public participation, and not the agency's examination of the contents of the renewal applications there involved, led to the Commission's proceedings.

[18]Petitioners emphasize (Pet. 16-17) the court of appeals' prior statements that " 'a licensee runs on his past record' " (quoting *Alianza*) and that " 'in a renewal proceeding past performance is [the Commission's] best criterion.' " (quoting *Office of Communication*). There is no inconsistency between these statements and the court of appeals' conclusion in this case. The obvious proposition that a licensee's past performance in a wide variety of areas is highly relevant in a renewal proceeding—a fact that was undisputed by any party below and clearly was recognized by the Commission in its Report and Order (Pet. App. 8a, 82a-85a)—does not address the distinctly different question of what information the Commission must ask for on renewal application forms.

the primary burden of presenting information on programming at renewal time." There is no merit to this contention.[19]

The Commission's regulatory experience supports its policy of viewing an absence of public complaints about a station's performance as an indication that license renewal is appropriate.[20] As the court of appeals put it (Pet. App.

---

[19]Petitioners also incorrectly suggest (Pet. 20) that the Commission's elimination of the requirement that television broadcasters complete an Annual Programming Report presents an issue that warrants review by this Court. The Annual Programming Report was instituted by the Commission in 1973. *Broadcast License Renewals*, 43 F.C.C.2d 1, 79-80 (1973). The Report was nothing more than a compilation of data concerning programming by the station on seven randomly selected days during the preceding twelve months. There is no statutory requirement for such a report. In eliminating it, the Commission explained that it had never used the information from the report in the manner that it envisioned when it adopted the requirement in 1973, and no longer believed it to be necessary. Pet. App. 97a-100a. The television station's program logs for the seven randomly selected days, which contain all the raw data from which the report was compiled, are required to be maintained in the station's public inspection files. Pet. App. 99a-100a. Compiling the data previously available in the report from the program logs in the public file is not a difficult or burdensome task for interested parties. Moreover, the Commission requires that a considerable amount of other information regarding the station's programming be available in the station's public files (see *supra*, note 6; 47 C.F.R. 73.3526, 73.3527); other information is readily available in newspapers and magazines, and simply by monitoring the station.

[20]The public has not been reticent about complaining of broadcasters' programming performance. For example, during the twelve-month period from November 1980 through October 1981, the Commission received approximately 3000 programming-related complaints *per month*, not including organized write-in campaigns. See Gov't C.A. Br. 22 n.25. The court of appeals mistakenly referred to this figure as 3000 complaints during the entire year. Pet. App. 14a n.16.

Programming is the area of a broadcast station's operation most readily available to the public. The Commission will have before it in the simplified renewal application the licensee's assurance that it is

13a-14a), "public silence supports an inference that a licensee has been complying with FCC policies. Such an inference is of course not in any way conclusive; but it is a factor which the FCC may weigh in making a 'public interest' determination."

In sum, the public has for many years played an important role in the Commission's license renewal process.[21] The simplification of that process has neither increased nor diminished that role.

3. Petitioners object (Pet. 18) to the Commission's decision not to require commercial radio licensees to submit the long form audit (see pp. 4-5 & n.4 *supra*), even though all other protections contained in the simplified renewal procedure apply equally to such licensees. Because the audit form would provide information concerning requirements that no longer apply to commercial radio stations, this objection simply seeks to relitigate petitioners' unsuccessful opposition to the Commission's radio deregulation

---

maintaining a file for public inspection. The public will therefore have access to a variety of information, including, for example (in the case of commercial radio stations) quarterly lists of programming that the station has offered in response to community issues. See *Deregulation of Radio*, 84 F.C.C. 2d 968, reconsid. denied, 87 F.C.C. 2d 797 (1981), aff'd in part and remanded in part, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983), on remand, *Deregulation of Radio*, 49 Fed. Reg. 19019 (1984); see also note 6, *supra*.

[21]The Commission's reliance on the public is not only appropriate; it may also be essential. The Commission's limited resources are simply not adequate "to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee" (*Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d at 1005 (Burger, J.)). In any event, "experience demonstrates consumers are generally among the best vindicators of the public interest" (*ibid.*), consistently with "our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life" (*id.* at 1003).

proceeding. That deregulation was substantially upheld by the court of appeals in a separate review proceeding to which petitioners NAACP and Geller were parties; this Court was not asked to review that decision. *Office of Communication of the United Church of Christ* v. *FCC*, *supra*.[22]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

BRUCE E. FEIN
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Attorney

Federal Communications Comission

MAY 1984

---

[22]Concluding that the Commission had inadequately explained its reasons for eliminating the requirement of program logs, the court remanded that limited aspect of the proceeding for further consideration. 707 F.2d at 1438-1442. In response to the remand, the Commission modified its decision. See note 4, *supra*.

Office - Supreme Court, U.S.
FILED
MAY 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BLACK CITIZENS FOR A FAIR MEDIA, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN BROADCASTING COMPANIES, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL RADIO BROADCASTERS ASSOCIATION

[List of Attorneys on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:
DOUGLAS S. LAND
American Broadcasting Companies, Inc.
1330 Avenue of the Americas
New York, New York 10019

ELEANOR S. APPLEWHAITE
JONATHAN I. STERNBERG
CBS Inc.
51 West 52 Street
New York, New York 10019

CARL R. RAMEY
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
Attorney for Respondent American Broadcasting Companies, Inc.

J. ROGER WOLLENBERG
STEPHEN A. WEISWASSER *
PHILIP D. ANKER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Attorneys for Respondent CBS Inc.

BARRY D. UMANSKY
1771 N Street, N.W.
Washington, D.C. 20036
Attorney for Respondent National Association of Broadcasters

THOMAS SCHATTENFIELD
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Suite 600
Washington, D.C. 20036
Attorney for Respondent National Radio Broadcasters Association

* Counsel of Record

May 18, 1984

QUESTION PRESENTED FOR REVIEW

Whether the Federal Communications Commission violated the Communications Act of 1934, or otherwise acted arbitrarily and capriciously, in deleting from its broadcast license renewal application forms questions designed to elicit certain program information, in light of the Commission's finding that: it does not need that information from each applicant (1) to decide whether renewal of the applicant's broadcast license will serve the public interest, convenience and necessity; or (2) to monitor broadcasters' compliance with the Commission's substantive rules and regulations?

REPRESENTATION REQUIRED BY RULE 28.1 OF THE RULES OF THE UNITED STATES SUPREME COURT

In light of the purposes of Rule 28.1, counsel construe the terms "parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party.

American Broadcasting Companies, Inc.; CBS Inc.; National Association of Broadcasters; and National Radio Broadcasters Association have no parent companies, subsidiaries or affiliates so defined.

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Statement of the Case	1
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Black Citizens For a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983) ..... *passim*

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 12

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 10, 13

FCC v. Schrieber, 381 U.S. 279 (1965) 13

FCC v. WOKO, Inc., 329 U.S. 223 (1946) 15

FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 10, 11, 12

FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961) 12

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 103 S. Ct. 2856 (1983) 16

National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) 8

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 10, 11

National Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) 13

Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) .. 15

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 12, 13

TABLE OF AUTHORITIES—Continued

FCC Authorities: Page

Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315, 5 F.C.C.2d 175 (1966) 7

Deregulation of Radio, 84 F.C.C.2d 968, *reconsideration denied*, 87 F.C.C.2d 797 (1981), *aff'd in part, remanded in part, Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), *on remand*, BC Docket No. 79-219 (Apr. 27, 1984) 3, 15

Formulation of Rules and Policies Relating to the Renewal of Broadcast Licensees, 43 F.C.C.2d 1, *reconsideration denied*, 44 F.C.C.2d 405 (1973) .. 7

Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, 49 Rad. Reg. 2d (P&F) 740 (May 11, 1981), *reconsideration denied*, 87 F.C.C.2d 1127 (1981) ..... *passim*

Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensees, FCC No. 80-327 (July 11, 1980), *summarized at* 45 Fed. Reg. 47,444 (1980) (Notice of Proposed Rulemaking) 5, 14

Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto, 59 F.C.C.2d 750, *modified*, 61 F.C.C.2d 27 (1976) 7

Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 48 Fed. Reg. 37,239 (1983) (Notice of Proposed Rulemaking) 3, 4

Statutes and Regulations:

47 U.S.C. § 308(b) (1976) 8

47 U.S.C.A. § 307(c) (West Supp. 1983) 7, 8

Act of December 27, 1974, Pub. L. No. 93-556, 88 Stat. 1789 10

TABLE OF AUTHORITIES—Continued

	Page
Communications Act of 1934, ch. 652, § 307(d), 48 Stat. 1064, 1084	9
Communications Act Amendments, 1952, ch. 879, § 5(d), 66 Stat. 711, 714	9
Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241, 95 Stat. 357, 736	9
Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980)	10
47 C.F.R. § 0.111 (1983)	13
47 C.F.R. § 73.1225 (1983)	13
47 C.F.R. § 73.1226 (1983)	13
47 C.F.R. § 73.3526 (1983)	3
Legislative Material:	
H.R. Rep. No. 208, 97th Cong., 1st Sess., *reprinted in* 1981 U.S. Code Cong. & Ad. News 1010	9, 10, 14
H.R. Rep. No. 1750, 82d Cong., 2d Sess, *reprinted in* 1952 U.S. Code Cong. & Ad. News 2234	9
S. Rep. No. 930, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 6241	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1498

BLACK CITIZENS FOR A FAIR MEDIA, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN BROADCASTING COMPANIES, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL RADIO BROADCASTERS ASSOCIATION

STATEMENT OF THE CASE

The petitioners seek certiorari from a decision of the United States Court of Appeals for the District of Columbia Circuit[1] upholding the authority of the Federal Communications Commission ("the Commission") to reassess its broadcast renewal application forms and to eliminate questions that did not produce information it needed. As the court of appeals recognized below, and as petitioners concede, this case involves no substantive change in the programming guidelines applicable to broadcasters or in the responsibility of broadcasters to

---

[1] *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983).

operate in the public interest. The changes of which petitioners complain concern solely the Commission's determination of what information it needs at license renewal time and how best to ensure licensee compliance with its substantive policies.

After a notice-and-comment rulemaking proceeding, the Commission on March 26, 1981, unanimously adopted the simplified renewal application form for television and radio licensees challenged here.[2] The Commission's renewal process now rests on five elements:

> (1) a simplified renewal application ("SRA") providing information regarding, *inter alia*, the applicant's legal and character qualifications;[3]
>
> (2) a longer application form requiring substantial programming information, much like previous renewal forms,[4] which a randomly selected group con-

---

[2] *Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 49 Rad. Reg. 2d (P&F) 740 (May 11, 1981) (hereinafter cited as *"Report and Order"*), *reconsideration denied*, 87 F.C.C.2d 1127 (1981) (hereinafter cited as *"Reconsideration Order"*).

[3] All licensees must certify in the SRA that they are in compliance with the alien ownership restrictions of the Communications Act; that the ownership reports required by the Commission are on file with the agency; and that they have placed in files available for public inspection the material described in note 6, *infra*. *Report and Order*, 49 Rad. Reg. 2d (P&F) at 744-45 ¶ 16.

All stations must also separately file with the Commission model programs demonstrating compliance with the Commission's equal employment opportunity rules and policies. *Id.* at 753, ¶ 47.

[4] The audit form requires the selected television stations to file, for example, information on their efforts to ascertain community needs, data with respect to the amounts of news and public affairs programming they have broadcast, descriptions of their programming for children, and information about their public service announcements. *Id.* at 743, ¶ 13.

The Commission decided not to subject commercial radio stations to the long form audit because, in a separate proceeding, it had eliminated for commercial radio many of the programming require-

sisting of at least five percent of television and noncommercial radio stations must file instead of the SRA;[5]

(3) a requirement that television and radio licensees maintain a file of detailed programming and other information, which the Commission and members of the public are free to inspect and which members of the public may use to evaluate and bring to the Commission's attention questions about each station's programming and operations;[6]

---

ments and related documentation covered in the long form. *See infra* notes 6, 46.

[5] As the court of appeals noted, the Commission has in fact required ten percent of eligible licensees to fill out the long form audit since the new process has been placed into effect. *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 410 (citing Commission brief).

[6] Commercial television stations must place in their public files, *inter alia*, annual listings of problems and needs facing the community and illustrative programming in response thereto; current promises concerning the amounts of news, public affairs, and other non-entertainment programming they will present; program logs for a composite week; and an equal employment opportunity program as well as statistical employment reports. 47 C.F.R. § 73.3526 (1983); *Report and Order*, 49 Rad Reg. 2d (P&F) at 745, ¶ 16.

Pursuant to the Commission's separate radio deregulation proceeding, commercial radio stations must maintain in their files some of the same information required of commercial television stations. Although they need not maintain composite week program logs, ascertainment survey materials, or programming promises, they must place in their public files, on a quarterly rather than annual basis, lists of programming responsive to community problems, issues, and needs. They must also provide the equal employment opportunity data described above. *See Deregulation of Radio*, 84 F.C.C.2d 968, *reconsideration denied*, 87 F.C.C.2d 797 (1981), *aff'd in part, remanded in part, Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), *on remand*, BC Docket No. 79-219, slip op. at 11, ¶ 29 (Apr. 27, 1984).

Currently pending before the Commission is a proceeding concerning possible reduction of the agency's television regulation along the lines of the radio deregulation proceeding. *Revision of Programming and Commercialization Policies, Ascertainment Require-*

(4) random on-site inspections by the Commission's staff to ensure compliance with the public file requirement as well as other substantive requirements;[7] and

(5) ad hoc inspections by the Commission's staff to investigate charges of station misconduct or rule violations and to follow up on renewal applications that suggest possible licensee non-compliance with Commission rules.[8]

The Commission decided to substitute this five-element plan for the lengthy application forms it had previously required of all licensees[9] because much of the information obtained by the forms had proven to be unnecessary to the renewal task and had imposed a substantial paperwork burden on both the Commission and licensees.[10] It

---

ments, and Program Log Requirements for Commercial Television Stations, 48 Fed. Reg. 37,239 (1983) (Notice of Proposed Rulemaking). No action has yet been taken. Presumably, if the Commission adopts some form of television deregulation, it will modify the public file requirements for television licensees accordingly.

[7] *Report and Order*, 49 Rad. Reg. 2d (P&F) at 752, ¶¶ 40-42.

[8] *Id.* at 752-53, ¶¶ 43-46.

[9] The old form for commercial television stations, for example, amounted to 21 pages, not including a number of appendices which stations were required to prepare. *Id.* at 742, ¶ 7.

[10] The Commission noted that the "renewal process . . . has consumed substantial Commission resources" not warranted by the results. *Id.* at 743, ¶ 11. Among other matters, the Commission elaborated on the adverse effect which the detailed applications had on Commission efforts in other areas:

> "The Commission currently devotes enormous energies and space to the renewal process during a time when we carry a significant backlog of applications for new facilities and major changes . . . . The Commission is faced with budget reductions and it is, therefore, incumbent upon us to pursue the most efficient uses of our staff . . . . We believe that adoption of the SRA will free up scarce resources for use in other areas." *Id.* at 747, ¶ 27.

determined that these problems could be avoided, and licensee compliance with the Commission's rules and policies achieved, through use of the revised, less burdensome renewal process. The Commission concluded that the new process provides adequate incentives for all broadcasters to comply with its rules because those subjected to the long application form and to on-site inspections are randomly selected.[11]

Finally, the Commission stressed that over the years public complaints have been the most important vehicle for bringing to its attention rule violations and inadequate station performance.[12] And it concluded that the information stations will be required to maintain in their public files will enable the public effectively to monitor station operations, particularly programming efforts.[13]

The D.C. Circuit upheld the Commission's new renewal process in a two-to-one decision (with Judge Wright dissenting). Writing for the court, Judge Bork stressed that the Communications Act expressly leaves the content of renewal application forms to the discretion of the Commission.[14] The court noted that the Commission had acknowledged its responsibility to determine, in the case

---

[11] *Id.* at 750, ¶ 35.

[12] *Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensees*, FCC No. 80-327 (July 11, 1980), at ¶ 6, *summarized* at 45 Fed. Reg. 47,444 (1980) (Notice of Proposed Rulemaking) (hereinafter cited as "*Notice*"). According to the Commission, the public has not hesitated to register complaints; for example, during the twelve-month period ending October 1981, the Commission received approximately 3,000 complaints each month concerning programming, not including organized write-in campaigns. Commission Brief at 22 n.25, *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983).

[13] *Report and Order*, 49 Rad. Reg. 2d (P&F) at 747, ¶ 26.

[14] *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 412.

of each station, whether license renewal would be in the public interest.[16] The court reviewed the various sources of information upon which the new process relies—the SRA, the multiple audit procedures, and public input—and concluded that the Commission had made a reasonable determination that they will provide sufficient information to permit the Commission to make the requisite statutory findings.[16] Finally, the court determined that the Commission had provided a reasoned explanation for the new plan: "that the same degree of compliance [with the Commission's substantive requirements] could be achieved with the simplified renewal application," [17] which will "free up scarce resources for use in other areas." [18] With respect to petitioners' arguments, which were largely identical to those being made before this Court, Judge Bork observed:

> "In overlooking the Commission's conclusion that the new method could achieve equivalent compliance, petitioners reveal the true nature of their complaint; they believe the old system works better and wish to substitute their judgment for that of the Commission. When seen in that light, petitioners' argument must fail." [19]

On December 12, 1983, the D.C. Circuit denied a petition for rehearing and suggestion for rehearing *en banc*.[20] The present petition for a writ of certiorari followed.

---

[15] *Id.* at 411.

[16] *Id.* at 413-14.

[17] *Id.* at 417.

[18] *Id.* (quoting *Report and Order*, 49 Rad. Reg. 2d (P&F) at 747, ¶ 27).

[19] *Id.* at 418 (footnote omitted).

[20] Four judges, including Judge Wright, would have granted rehearing *en banc*.

ARGUMENT

This case presents none of the traditional bases for grant of certiorari. The decision below is not in conflict with a decision of another circuit or of this Court. And the case presents no important or novel issues requiring this Court's attention. It involves only the Commission's well-established—and regularly exercised [21]—discretion to modify its application forms and methods of enforcing substantive rules. The Commission has not altered any "technical, programming or other substantive requirements" imposed on licensees.[22] Nor has it avoided its statutory obligation to renew a station license only if it determines that the "public interest, convenience, and necessity would be served thereby." [23]

The Commission has simply determined that it can better fulfill these responsibilities by obtaining pertinent information from all licensees; taking a hard, in-depth look at a randomly selected group of applicants; and relying upon public input as well as its own random inspections to bring to its attention possible violations of its rules and policies. This approach, the Commission has decided, is preferable to requiring all licensees to submit exten-

---

[21] The Commission has modified its application forms on numerous occasions. *See, e.g., Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 59 F.C.C.2d 750, 752, *modified*, 61 F.C.C.2d 27 (1976); *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licensees*, 43 F.C.C.2d 1, *reconsideration denied*, 44 F.C.C. 2d 405 (1973); *Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314, and 315*, 5 F.C.C.2d 175, 178 (1966). In its opinion in this proceeding, the Commission expressly left the door open for further revisions; it indicated that it may increase the percentage of licensees required to complete the audit form if that step proves warranted. *Report and Order*, 49 Rad. Reg. 2d (P&F) at 750, ¶ 34.

[22] *Report and Order*, 49 Rad. Reg. 2d (P&F) at 741, ¶ 4.

[23] 47 U.S.C.A. § 307(c) (West Supp. 1983).

sive materials, much of which the Commission had not in the past effectively reviewed.[24]

As the court below concluded, this decision by the Commission is fully consistent with the language of the Communications Act of 1934, as illuminated by its legislative history and as interpreted by this Court. By its terms, the Communications Act grants the Commission broad discretion to determine what information to solicit on renewal applications. Thus, while the Commission may renew a license only upon a finding that renewal will serve "the public interest, convenience, and necessity," [25] the Act neither prescribes the factors the Commission must consider in making this finding nor establishes what information it must obtain. To the contrary, Section 308(b) explicitly leaves to the Commission the decision as to what information to require on renewal forms:

> All applications for station licenses, or modifications or renewals thereof, shall set forth *such facts as the Commission by regulation may prescribe* as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . . .[26]

The legislative history of amendments to the Act underscores the Commission's broad discretion to determine the information submitted on renewal applications. As originally enacted, the statute permitted the Commission to grant a station's renewal application only if it could make the same finding that it was required to make in

---

[24] *See Report and Order*, 49 Rad. Reg. 2d (P&F) at 748, ¶ 11.

[25] 47 U.S.C.A. § 307(c) (West Supp. 1983).

[26] 47 U.S.C. § 308(b) (1976) (emphasis added). As the D.C. Circuit concluded in another case, Section 308(b) "leaves it within the discretion of the Commission to decide which facts relating to such factors it wishes to have set forth in applications." *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 645 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

connection with an initial grant of a license.[27] The Commission therefore required applicants for initial license and for renewal to file forms requesting the same range of information. But in 1952 Congress eliminated the provision requiring renewal applicants to meet initial licensing criteria, specifically because it considered much of the information required of applicants for initial permits unnecessary at renewal time.[28] Since that time, Congress has taken several opportunities to make clear its desire that the license renewal process be made less burdensome.[29]

---

[27] Section 307(d) of the Act originally provided in pertinent part:

> "Upon the expiration of any license, upon application therefor, a renewal of such license may be granted . . . but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications." Communications Act of 1934, ch. 652, § 307(d), 48 Stat. 1064, 1084.

[28] Communications Act Amendments, 1952, ch. 879, § 5(d), 66 Stat. 711, 714. Thus, the House Report to the 1952 amendment stated:

> "Section 307(d) as revised . . . provid[es] that the Commission shall not require an applicant for renewal to file any information which previously has been furnished to the Commission or which is not directly material to the consideration that affects the granting or denial of the application. Considerable dissatisfaction was expressed . . . with the burdensome requirements which applicants for renewal sometimes have been compelled to meet in the way of furnishing detailed information." H.R. Rep. No. 1750, 82d Cong., 2d Sess. 8, *reprinted in* 1952 U.S. Code Cong. & Ad. News 2234, 2242.

[29] Thus, Congress in 1981 extended the term of broadcast licenses from three years to five years for television stations and seven years for radio stations (Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241, 95 Stat. 357, 736, *amending* 47 U.S.C. § 307(d) (1976)), explaining that this step, *inter alia*, will "help to reduce costs to broadcasting and the Commission costs, while at the same time allowing the Commission to do a better job reviewing broad-

This Court has recognized the breadth of the Commission's discretion to define its own procedures. As Justice Frankfurter explained in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940):

> "Necessarily, . . . questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked . . . were explictly and by implication left to the Commission's own devising, so long, of course, as it observed the basic requirements designed for the protection of private as well as public interest." [30]

More than forty years later, this Court reiterated this principle. In *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), the Court reaffirmed that "the Commission's

---

casters' performance." H.R. Rep. No. 208, 97th Cong., 1st Sess. 895, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1010, 1257.

Moreover, in both 1974 and 1980 Congress passed legislation to curb the mounting paperwork burden associated with the administrative process. The 1974 enactment created a Commission on Federal Paperwork to study ways to minimize unnecessary information-gathering by government. Act of December 27, 1974, Pub. L. No. 93-556, 88 Stat. 1789. The 1980 legislation, which amended the Federal Reports Act and renamed it the Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980), required federal agencies to "make only necessary information requests of the public" and to eliminate "those burdens which are found to be unnecessary and thus wasteful." S. Rep. No. 930, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6241, 6243.

[30] 309 U.S. at 138. This Court has relied on the Commission's ability and traditional willingness, *see supra* note 21, to modify its procedures over time, as experience and circumstances dictate, as a basic reason for according the agency substantial judicial deference:

> "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943), *quoted in FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981).

judgment regarding how the public interest is best served is entitled to substantial judicial deference." [31]

In sum, the affirmance by the court below of the Commission's interpretation of its statutory duties raises no question warranting further review. Neither petitioners nor Judge Wright, in dissent below, dispute that the Commission enjoys broad discretion under the statute to revise its license renewal process.[32] But they both suggest that licensees seeking renewal must run on their past programming record, and they contend that this particular revision will leave the Commission with insufficient data about each licensee's programming to make the requisite public interest finding prior to grant of renewal.[33] The Commission has not receded from the view that licensees with inadequate or deficient records, in the programming area or otherwise, should not be entitled to license renewal. Based on its administrative experience

---

[31] 450 U.S. at 596 (citation omitted). In discussing one of its prior decisions, the Court underscored this point:

> "Although it was declared in *National Broadcasting Co. v. United States* [319 U.S. 190 (1943)] that the goal of the Act is 'to secure the maximum benefits of radio to all the people of the United States,' . . . it was also emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved. The Court accordingly declined to substitute its own views on the best method of encouraging effective use of the radio for the views of the Commission." 450 U.S. at 593-94 (citations omitted).

[32] Indeed, Judge Wright acknowledged that "nothing on the face of the Act explicitly requires that programming inquiries be included on all applications for renewal." *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 430 (Wright, J., dissenting).

[33] *See* Petition for Certiorari at 16-17; *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 433-35 (Wright, J., dissenting). Judge Wright's dissent makes clear his view that the Commission must review each particular licensee's past programming record before granting renewal and cannot rely upon the other means outlined in its order to ensure that licensees are operating in the public interest. *See, e.g.*, 719 F.2d at 435.

and an extensive record,[34] the Commission has concluded that the variety of enforcement and monitoring techniques it has created will still require all licensees to maintain a sound operating record warranting renewal and that it is unnecessary to require each to file extensive information in the application form.

This Court has made clear that such an agency decision, grounded in judgmental or predictive conclusions, is entitled to substantial judicial deference,[35] and nothing in this record suggests that the decision falls outside the bounds of deference to which the Commission is entitled. The Commission has processed thousands of renewal applications and must be presumed to know best what information it needs and what enforcement methods have proven to be successful.[36] As the court below recognized, what petitioners sought below—and what they seek here—is the substitution of a court's judgment for that of the agency on matters of the very kind which this Court has stated must be left to agency discretion and expertise.[37]

---

[34] Over one hundred parties filed comments in this proceeding. *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 421 (Wright, J., dissenting).

[35] *FCC v. WNCN Listeners Guild*, 450 U.S. at 595-96; *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978); *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

[36] As the court below stated:

> "the Communications Act gives the FCC 'substantial discretion to reconsider and review the appropriateness of [its] regulations including the continued need for particular information in connection with renewal applications.' . . . Moreover, the FCC has worked with renewal applications for many years and has developed considerable expertise and experience." *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 418 (footnotes and citations omitted).

[37] Judge Wright's dissent is also an argument for substitution of judicial judgment for agency judgment.

Compare Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978) ("admin-

Contrary to petitioners' contentions, the Commission's revised renewal process is consistent with traditional Commission enforcement techniques. The Commission has never relied exclusively, or even primarily, on the renewal application to monitor licensee compliance with such long-standing requirements as the fairness doctrine, equal opportunity for opposing candidates, and sponsorship identification. Instead, the Commission has investigated a licensee's performance in these areas only upon complaint or when it has had other reason to suspect non-compliance.[38] The Commission has also historically relied on random inspections,[39] and has used random sampling techniques,[40] to monitor licensee programming performance. And the Commission has traditionally considered public monitoring a significant element of its

---

istrative agencies 'should be free to fashion their own rules of procedures and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties' ") (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 143).

[38] *See, e.g., National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, 1116 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (upholding Commission decision to police the fairness doctrine on an ad hoc basis, rather than review licensee compliance at renewal time).

[39] For example, the Commission's Field Operations Bureau has for years conducted random inspections to ensure licensee compliance with technical requirements. *See* 47 C.F.R. §§ 0.111, 73.1225-26 (1983).

[40] Thus instead of requiring a television licensee at renewal time to submit statistical data on all of its programming in the license period, the Commission randomly selected seven days to comprise a typical week, for which the licensee was required to compile its programming information. This procedure was intended to have the effect inherent in any random enforcement device, including those adopted in the present proceeding—a licensee, not knowing in advance the dates for the composite week, complied with programming requirements generally so as to avoid having deviations reflected in the data.

enforcement scheme.[41] These enforcement techniques—random audits and public monitoring—are precisely the ones adopted by the Commission in this proceeding and upon which it will rely.

These methods will provide the Commission with a wide array of information at renewal time. The SRA will provide data on each licensee's character and legal qualifications as well as its other broadcast and media interests. The public file requirement will ensure that the Commission—and the public[42]—will have access to significant information about each licensee's programming, including lists of its broadcasts responsive to community needs. The Commission will also have on file each television licensee's current promises as to the minimum amounts of news, public affairs, and other nonentertainment programming it will broadcast.[43] All tele-

---

[41] *See Notice* ¶ 6, *summarized at* 45 Fed. Reg. 47,444 (1980).

[42] Although petitioners, as well as Judge Wright, fault the Commission for relying in part on the public to call attention to shortcomings in the performance of licensees, Congress, in extending the license term for television and radio stations, recently recognized the significance of public input:

> "[T]he most serious station deficiencies are generally brought to the Commission's attention through complaints filed during the license term. Since this complaint process will continue, the public will have ample opportunity to bring such matters promptly to the Commission's attention. Thus, an extension of the license term will not lessen the Commission's oversight and enforcement powers necessary to protect the public." H.R. Rep. No. 208, 97th Cong., 1st Sess. 896, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1010, 1258.

[43] By virtue of this requirement, the Commission will be able to evaluate television licensee undertakings in substantially the same manner as it had under the previous system—in accordance with the processing guidelines set out in its rules. If a television licensee's revised promises fall below the guidelines, the staff must forward the renewal application to the full Commission for review. If, on the other hand, a licensee's promises continue to exceed the Commission's guidelines, and the rest of the application raises no questions, the application may be granted. In either case, the Com-

vision stations are obligated to report any substantial deviations in these promises,[44] and misrepresentations can result in a loss of license.[45] Finally, the random audit form as well as public input will provide the Commission with further pertinent information and will strengthen the incentives for licensee compliance with Commission rules.

To be sure, the Commission will not have before it, with respect to every renewal application, detailed information regarding the licensee's programming efforts during the license term. But, as the court below concluded, the statute does not prohibit the Commission in individual cases from presuming that renewal is justified, if the variety of enforcement techniques and public monitoring opportunities it has put in place have not produced any indication that a station has violated the rules or is otherwise operating in a fashion that is inconsistent with the public interest.[46]

---

mission's treatment of the television licensee's promises will be no different from what it was in the past.

[44] *See Report and Order*, 49 Rad. Reg. 2d (P&F) at 757, ¶ 64; *Reconsideration Order*, 87 F.C.C.2d at 1129.

[45] *See, e.g., FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946).

[46] *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 416. As with other aspects of the revised renewal process, this presumption is consistent with traditional Commission practice. The Commission has always "relied to the maximum extent on the good faith efforts and discretion of licensees in carrying out their obligations." *Deregulation of Radio*, 84 F.C.C.2d at 971.

Nor does petitioners' displeasure with the Commission's deregulation of radio, *see* Petition For Certiorari at 17-18, provide a basis for granting certiorari in this case. The D.C. Circuit largely upheld the revisions adopted by the Commission in its separate radio deregulation proceeding. *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). No review of that decision by this Court was sought.

Petitioners have not demonstrated that the information which radio licensees must maintain in their public files will provide the

Finally, petitioners' argument that the Commission failed to engage in reasoned decision-making gives rise to no question requiring this Court's attention. As Judge Bork noted, "[t]his is not a case where an agency altered course without acknowledging or recognizing the change. . . . Nor is this a case where the agency has failed to provide a reasoned explanation for its change in policy."[47] Instead, the Commission explained in detail its view that the revised renewal process should afford it sufficient information to make the public interest determination, at a substantial saving of cost and resources. The Commission carefully reviewed the numerous comments filed both in support and opposition to the proposed renewal process. While petitioners may disagree with the Commission's ultimate conclusion, their disagreement does not render its decision arbitrary or require this Court's review.

Commission and public with insufficient data to monitor licensee compliance with the Commission's substantive policies. And they certainly have not explained why the Commission's decisions in the radio deregulation proceeding should cause this Court to grant certiorari in a separate case concerning renewal application forms for all licensees.

[47] *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 417. In this respect, this case is substantially different from *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983), upon which petitioners rely. In that case, this Court found the rescission of a regulation by the National Highway Traffic Safety Administration to be arbitrary and capricious, primarily because the agency had not considered an obvious alternative to rescission. 103 S. Ct. at 2868-69. Here, by contrast, petitioners do not claim that the Commission ignored any alternatives to the renewal system it adopted or any of the arguments they presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
DOUGLAS S. LAND
American Broadcasting Companies, Inc.
1330 Avenue of the Americas
New York, New York 10019

ELEANOR S. APPLEWHAITE
JONATHAN I. STERNBERG
CBS Inc.
51 West 52 Street
New York, New York 10019

CARL R. RAMEY
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
Attorney for Respondent American Broadcasting Companies, Inc.

J. ROGER WOLLENBERG
STEPHEN A. WEISWASSER
PHILIP D. ANKER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Attorneys for Respondent CBS Inc.

BARRY D. UMANSKY
1771 N Street, N.W.
Washington, D.C. 20036
Attorney for Respondent National Association of Broadcasters

THOMAS SCHATTENFIELD
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Suite 600
Washington, D.C. 20036
Attorney for Respondent National Radio Broadcasters Association

May 18, 1984